89-1978

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOSLYN MANUFACTURING COMPANY,
Petitioner,

v.

T. L. JAMES & COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Hazardous waste sites present a national problem that will cost billions to rectify.[1] Congress passed CERCLA to provide a national plan in which "owners or operators" of hazardous waste facilities are liable (to the government or to private parties for contribution) for a share of the cleanup cost.

Many sites now being cleaned up were owned or operated by corporations which have been dissolved or are otherwise unable to pay their fair share of CERCLA liability. In this contribution case, the Fifth Circuit held a parent corporation could only be liable for cleanup costs at such a site if its dissolved subsidiary had been a sham under state law.

The Fifth Circuit expressly declined to follow the Second Circuit and other federal courts which have held shareholders and parent corporations liable under CERCLA by reading "owner or operator" to include those who actively participated (or could have) in the management of the facility.

The Fifth Circuit also chose not to follow decisions of this Court and other circuits in which a valid corporate

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[1] For example, one Congressional study estimates that the amount of federal funds needed to clean up sites listed on the NPL would "*rang[e] from about $16.7 to $23.8 billion, far in excess of the available $8.5 billion.*" Survey & Investigations Staff, Report to the House Committee on Appropriations on the Status of the Environmental Protection Agency's Superfund Program, at Summary (March 1988) (emphasis in original), reprinted in Practicing Law Institute, Practical Approaches To Reduce Environmental Cleanup Costs 409 (1988).

form under state law is disregarded under federal common law to serve the purpose of a federal statute; here, the subsidiary's separate identity might have been disregarded to fulfill CERCLA's purpose of having a person which profited from the disposal of hazardous waste, the parent corporation, help clean up the disposal site.

Joslyn believes the lower courts' refusal to even consider whether a parent corporation could be directly liable under CERCLA as an "owner or operator" is inconsistent with CERCLA's purposes. Joslyn believes it was further error to apply a state's rigid alter ego analysis, as such an approach threatens CERCLA's status as a truly national plan. The present uncertainty encourages litigation and discourages voluntary cooperation in cleanup efforts.

The Court can resolve these conflicts by deciding this case, specifically:

1. Under what circumstances is a parent corporation directly responsible for environmental remediation costs as an "owner or operator" of its subsidiary's hazardous waste facility under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. Section 9601, *et seq.*?

2. In determining whether to disregard a subsidiary's separate corporate form to hold its parent corporation responsible for environmental remediation costs under CERCLA, should CERCLA's purpose of having persons who benefited from the disposal of hazardous waste also share in the cleanup costs be considered under a federal common law analysis, rather than state law?

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Joslyn Manufacturing Co.
T. L. James & Co., Inc.
Powerline Supply Co., Inc.
Nelda S. Elliott and Bill Elliott
Louisiana & Arkansas Railway Co.
Lance D. Alworth
Floyd Benjamin James
George William James

RULE 28.1 LISTING

Petitioner Joslyn Manufacturing Company is a wholly owned subsidiary of Joslyn Corporation, a publicly held and traded corporation with outstanding securities in the hands of the public. Affiliates of Petitioner include other subsidiaries of Petitioner's parent corporation, being Joslyn Clark Controls, Inc., Joslyn Canada Inc., Joslyn Hi-Voltage Corporation, Joslyn Electronic Systems Corporation, Joslyn Power Products Corporation, Joslyn Research and Development Corporation, ADK Pressure Equipment Corporation, ADK Pressure Equipment Limited, Sunbank Family of Companies, Inc., Sunbank Electronics, Inc., Air-Dry Corporation of America, Royal Diecasting Corporation and Joslyn Foreign Sales Corporation.

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IN THE

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OPINIONS BELOW

Joslyn Manufacturing Co. v. T. L. James & Co., Inc., 893 F.2d 80 (5th Cir. 1990), reproduced herein as Appendix A; and *Joslyn Corp. v. T. L. James & Co., Inc.*, 696 F.Supp. 222 (W.D. La. 1988), reproduced herein as Appendix B.

JURISDICTION OF THIS COURT

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on January 29, 1990. A petition for rehearing filed by Powerline Supply Company was

denied on March 26, 1990, and is reproduced herein as Appendix C. This Court has jurisdiction to issue the requested writ of *certiorari* under 28 U.S.C. Section 1254(1).

FEDERAL STATUTES INVOLVED

42 U.S.C. Section 9601(20)(A)
42 U.S.C. Section 9607(a)
42 U.S.C. Section 9613(f)(1)

(See Appendices D, E & F)

STATEMENT OF THE CASE

Factual Background

In 1935, T. L. James & Company, Inc. ("James Company") of Ruston, Louisiana paid $20,110 for 120 shares of voting common stock and 200 shares of non-voting preferred stock in Lincoln Creosoting Co., Inc. ("Lincoln"). While 80 shares of voting common stock were given to Messrs. Tooke and Hayes, the men who would directly supervise operation of Lincoln's wood-treating facility in Bossier City, Louisiana, they endorsed their shares back to James Company until such time as dividends repaid the original value of their shares (which never occurred). During Lincoln's entire operating life from 1935 until 1950, James Company controlled 100% of Lincoln's stock.

It is undisputed that Lincoln disposed of hazardous waste at the Bossier City facility. Lincoln contaminated

its drainage ditch, large drainage slough, and its treated wood railroad track area. It paved blacktop roads on the site with creosote sludges. This contamination was readily visible and could not have gone unobserved. The minutes of Lincoln's 1944 shareholder meeting reflect that spending money to improve drainage was discussed, but no action was ever taken by Lincoln or James Company.

James Company profited from Lincoln. While no dividends were ever paid on common stock, James Company received dividend income from its sole ownership of Lincoln's preferred stock.

James Company provided all of Lincoln's financing, with credit running as high as $800,000. Lincoln had an open line of credit with James Company. James Company guaranteed Lincoln's larger credit accounts.

T. L. James was president of both James Company and Lincoln until his death in 1944. He was also James Company's major shareholder and voted James Company's stock in Lincoln by proxy. Until his death, five of the seven members of Lincoln's Board of Directors were officers, directors and/or shareholders of James Company. T. L.'s son, G. W. James, served as Lincoln's president from 1944 to 1950. G. W. James was also an officer of James Company. James Company bought out Hayes in 1944 and sold his stock at cost to G. W. James' cousin, J. E. Lacy. Lacy then became Lincoln's head of production and a Lincoln director. With Lacy's vote, James Company continued to control Lincoln's Board of Directors for the remainder of its existence.

Lincoln's registered office with the Louisiana Secretary of State was the James Building in Ruston; Lincoln had no lease and paid no rent at that address. A common employee of the two companies, V. A. Davidson, worked at

James Company headquarters and served as liaison between Lincoln personnel at the treatment plant and T. L. James or G. W. James. Davidson received daily reports from the plant and an itemized statement of all collections and disbursements by Lincoln's plant personnel.

When the I.R.S. sought to disallow his salary as Lincoln president, G. W. James stated that from 1944 through 1950 he was in constant contact with plant management by phone and held conferences with them in Ruston not less than once a month and as often as once a week.

Lincoln sold the facility to Joslyn in 1950. Lincoln then repurchased 41 shares of common stock held by certain Lincoln employees and Tooke's heirs for $2250 a share. In 1951, James Company donated its 120 shares of Lincoln common stock to Centenary College which then received the largest share of Lincoln's assets on its dissolution. James Company received a tax benefit from the donation. Lincoln's Certificate of Dissolution was executed on December 19, 1952.

Joslyn owned and operated the facility until 1969 when it sold the property to Koppers, Inc.

In 1986 and 1987, the Louisiana Department of Environmental Quality issued orders directing James Company, Joslyn and subsequent site owners to clean up the Lincoln site pursuant to the Louisiana Environmental Quality Act ("LEQA"). These state administrative proceedings have been inactive during the course of this case. Joslyn has begun remedial action and expects the cleanup to cost several million dollars.

Proceedings Below

Joslyn brought suit in the United States District Court for the Western District of Louisiana against James Com-

pany and others seeking contribution for cleanup costs incurred to date and a declaratory judgment of liability for future contribution under both CERCLA and LEQA. Jurisdiction was based on 42 U.S.C. Section 9613(b).

Other defendants (including Third-Party Defendant Lance D. Alworth who joins this petition) cross-claimed against James Company. Defendants Powerline Company, Nelda Elliott and Bill Elliott also filed third-party actions against G. W. James and F. B. James (G. W.'s brother, James Company's president and a former Lincoln Director).

The trial court, Stagg, J., granted summary judgment in favor of James Company, G. W. James and F. B. James on the ground that the facts would not support piercing the corporate veil under Louisiana law, relying on *United States v. Jon-T Chemicals*, 768 F.2d 686 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014, 106 S.Ct. 1194 (1986). The *Jon-T* analysis does not include any consideration of CERCLA's purposes in determining whether a subsidiary's corporate identity should be disregarded to reach its parent.

Judge Stagg expressly declined to follow the analysis of other federal courts, including the Second Circuit, in which corporate officers and parent corporations have been held directly liable as an "owner or operator" under CERCLA. *Joslyn Corp. v. T. L. James & Co., Inc.*, 696 F.Supp. 222 (W.D. La. 1988).

The Fifth Circuit affirmed in all respects.[2] It also expressly declined to follow other federal courts' reading of "owner or operator":

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[2] The lower courts granted summary judgment against Joslyn on its CERCLA and LEQA claims under the same analysis. Joslyn also seeks review of the judgment entered against it on its claims under LEQA.

> Joslyn urges this court to read CERCLA's definition of "owner or operator" liberally and broadly to reach parent corporations whose subsidiaries are found liable under the statute. In doing so, Joslyn urges us to follow the several courts, including the Second Circuit, which have extended CERCLA liability to parents. See *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *United States v. Mottolo*, 695 F.Supp. 615 (D. N. H. 1988); *Colorado v. Idarado Mining Co.*, 707 F.Supp. 1227 (D. Col. 1989); *Vermont v. Staco, Inc.*, 684 F.Supp. 822 (D. Vt. 1988); *Idaho v. Bunker Hill Co.*, 635 F.Supp. 665 (D. Idaho 1986). We decline to do so.

Joslyn Manufacturing Co. v. T. L. James & Company, 893 F.2d 80, 82 (5th Cir. 1990).

ARGUMENT

I.

The Decision Below Creates A Conflict Among The Federal Courts As To What Degree of Involvement In The Management Of A Subsidiary's Hazardous Waste Facility Will Render A Parent Corporation Directly Liable As An "Owner Or Operator" Under CERCLA.

A. The Statutory Framework.

CERCLA Section 113(f)(1) provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under Section 107(a)" for site clean-ups, and that "[s]uch claims . . . shall be governed by federal law." 42 U.S.C. Section 9613(f)(1). CERCLA Section 107(a), 42 U.S.C. Section 9607(a), in relevant part, imposes liability on the following persons:

> (1) the owner and operator of a vessel or facility, [or]
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of. . .

CERCLA Section 101(20)(A), 42 U.S.C. Section 9601(20)(A) defines "owner or operator" in relevant part as:

> (ii) in the case of an onshore facility . . . any person owning or operating such facility. . . Such term does not include a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

B. Some Courts, Notably The Second Circuit, Have Adopted An Interpretation Of "Owner Or Operator" Which Can Include A Parent Corporation Without Finding Its Subsidiary To Be A Sham.

In *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985), the Second Circuit imposed direct CERCLA liability on a corporate officer and shareholder, LeoGrande. It did so by finding that the exclusion from "owner or operator" set forth in Section 9601(20)(A) of "a person who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the facility," implies that a shareholder who participates in the management of the corporation is liable under CERCLA. *Id.*, 1052. LeoGrande's liability was "direct" in the sense that he was held liable because of his personal role and responsibility in the management of the facility, not because the corporation (which technically owned the facility) was a sham.

This analysis was derived from *United States v. Northeastern Pharmaceutical and Chemical Company, Inc.*, 579

F.Supp. 823 (W.D. Mo. S.D. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S.Ct. 146 (1987) ("NEPACCO"):

> The statute literally reads that a person who owns interest in a facility and is actively participating in its management can be held liable for the disposal of hazardous waste. Such a construction appears to be supported by the intent of Congress. CERCLA promotes the timely cleanup of inactive hazardous waste sites. It was designed to insure, so far as possible, that the parties responsible for the creation of hazardous waste sites be liable for the response costs in cleaning them up. Congress has determined that the persons who bore the fruits of hazardous waste disposal also bear the costs of cleaning it up. The Eighth Circuit adopted the definition given "owner or operator", 33 U.S.C. Section 1321(a)(6), by the Fifth Circuit in *United States v. Mobil Oil Corporation*, 464 F.2d 1124, 1127 (5th Cir. 1972):
>
> > The owner-operator of a vessel or a vacility [sic] has the capacity to make timely discovery of oil discharges. The owner-operator has power to direct the activities of persons who control the mechanisms causing the pollution. The owner-operator has the capacity to prevent and abate damage. Accordingly, the owner-operator of a facility governed by the WPCA, such as the Mobil facility here, must be regarded as a "person in charge" of the facility for the purposes of Section 1161. A more restrictive interpretation would frustrate congressional purpose by exempting from the operation of the Act a large class persons who are uniquely qualified to assume the burden imposed by it.

Id., 579 F.Supp. 823, 848-849. Accord: *United States v. Nicolet, Inc.*, 712 F.Supp. 1193 (E.D. Pa. 1989); *United States v. Kayser-Roth Corp.*, 724 F.Supp. 15 (D.R.I. 1989);

United States v. Conservation Chemical Co., 628 F.Supp. 391 (W.D. Mo. 1985); *United States v. Carolawn*, 21 ERC 2124 (D.S.C. 1984); *United States v. Mirabile*, 15 E.L.R. 20994 (E.D. Pa. Sept. 4, 1985); *United States v. Mirabile*, 23 ERC 1511 (E.D. Pa. 1985).

This analysis has been used to find a parent corporation directly liable as an owner or operator with respect to a subsidiary's facility where the parent had the capacity to make timely discovery of waste disposal at the facility; the power to direct the activities of persons who controlled the mechanisms causing the pollution; and the capacity to prevent and abate damage. *Idaho v. Bunker Hill Co.*, 635 F.Supp. 665 (D. Idaho 1986).

C. Both The Trial Court And The Fifth Circuit Expressly Declined To Apply This Interpretation Of "Owner Or Operator."

Joslyn argued below that James Company was directly liable as an owner or operator because it owned a controlling interest in Lincoln; had actual knowledge of the disposal of chemicals at the site; had and exercised power over the persons who controlled the mechanisms causing the pollution (and therefore had the capacity to prevent and abate damage); and had earned substantial income from Lincoln.

Both the district court and the Fifth Circuit expressly declined to follow this approach and limited their attention to whether Lincoln's corporate veil should be pierced under state law. This Court should decide whether this was error and, if so, further determine the level of participation which will render a parent corporation directly liable as an "owner or operator" under CERCLA.

II.

The Decision Below Creates A Conflict In The Federal Courts As To The Respect Afforded The Corporate Form Of A Responsible Party Under CERCLA.

A. This Court Has Applied A Federal Common Law Rule In Which A Valid Corporate Form Under State Law Is Disregarded When Necessary To Fulfill The Purpose Of A Federal Statute.

CERCLA Section 113(f)(1), 42 U.S.C. Section 9613(f)(1), expressly provides that federal law shall apply in CERCLA contribution actions. This Court has recognized a federal common law rule in which the corporate form is disregarded to fulfill a federal legislative policy. *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983); *Anderson v. Abbott*, 321 U.S. 349 (1944).

The First Circuit applied this rule in an environmental context in *Town of Brookline v. Gorsuch*, 667 F.2d 215 (1st Cir. 1981). In that case, the court was asked to review a decision of the acting regional administrator ("ARA") of the Environmental Protection Agency that MATEP, a corporation organized under the laws of Massachusetts whose stock was owned by Harvard, qualified for the PSD exemption in the Clean Air Act as a nonprofit health or education institution. Brookline challenged that finding on the grounds that MATEP was organized as a Massachusetts for-profit corporation and that its corporate veil could not be pierced to find a "joint arrangement" with Harvard under Massachusetts law.

In upholding the ARA's decision, the court relied on this federal rule:

> The general rule adopted in the federal cases is that "a corporate entity may be disregarded in the interests of public convenience, fairness and equity." *Id.* at 738 (citations omitted). In applying this rule, fed-

> eral courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form, see *Schenley Distillers Corp. v. United States*, 326 U.S. at 437, 66 S.Ct. at 249; *Flink v. Paladini*, 279 U.S. 59, 62, 49 S.Ct. 255, 255, 73 L.Ed. 613 (1929), an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine, *Capital Telephone Co. v. FCC*, 498 F.2d at 738-39. As we observed above, the purposes of the PSD exemption are not affected by the corporate form of the nonprofit health or education institution. The ARA acted in accordance with federal law in looking beyond MATEP to Harvard's ownership and the relationship with the hospitals.

Id., 221.

Courts applying this analysis have found CERCLA also does not place importance on the corporate form:

> As stated above, one of CERCLA's expressed goals is to ensure "that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created." *Dedham Water Co., supra*, 805 F.2d at 1081 (quoting *Reilly Tar & Chem. Corp., supra*, 546 F.Supp. at 1112). This goal would be frustrated if the mere act of incorporation were allowed to impede the recovery of response costs, for a nonincorporated violator could avoid liability simply by changing company structure. Furthermore, the absence of explicit statutory language addressing the effect of incorporation, the Act's strict liability scheme, and the broad and encompassing categories of potentially responsible parties ineluctably lead the Court to the conclusion that CERCLA places no importance on the corporate form.

United States v. Mottolo, 695 F.Supp. 615, 624 (D.N.H. 1988). See also *United States v. Kayser-Roth Corp.*, 724

F.Supp. 15 (D.R.I. 1989); *United States v. Nicolet, Inc.*, 712 F.Supp. 1193 (E.D. Pa. 1989).

B. Neither The Trial Court Nor The Fifth Circuit Applied This Federal Rule And Instead Relied Solely On A State Law "Alter Ego" Analysis.

The lower courts did not discuss petitioner's citation of the cases set forth in the preceding subsection. The district court did find that federal law applied, but concluded that the Fifth Circuit used the same alter ego test in both federal question and diversity cases, citing *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 690 n.6 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014, 106 S.Ct. 1194, 89 L.Ed. 2d 309 (1986). Although *Jon-T* involved Texas law, the district court used *Jon-T*'s laundry list of 12 technical factors to determine whether to pierce Lincoln's corporate veil under Louisiana law. This analysis gave no weight to CERCLA's purposes or the equity of having James Company contribute to the cleanup to the extent it was involved in, and benefited from, the disposal of hazardous waste at Lincoln's plant.

The Fifth Circuit approved this approach, rejecting not only the federal common law approach but also the arguments of petitioner and the State of Louisiana (as *amicus*) that Louisiana law also allows a court to disregard the separate corporate identity of even a valid corporation when necessary to serve a compelling state interest.

III.

This Court Should Resolve These Conflicts.

The scope of "owner or operator" under CERCLA is important not only to private CERCLA contribution actions but also to the government's actions for environmental remediation costs. Joslyn believes the lower courts

erred in refusing to even consider whether a parent corporation could be directly liable under CERCLA as an "owner or operator" without "piercing the corporate veil." Joslyn believes it was further error to apply a state's rigid alter ego analysis, as such an approach threatens CERCLA's status as a truly national plan. The present uncertainty encourages litigation and discourages voluntary cooperation in cleanup efforts. This Court should decide these issues.

CONCLUSION

Joslyn respectfully requests the Court to grant this petition and issue a writ of *certiorari* to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Joining in the Petition

APPENDICES

APPENDIX A

JOSLYN MANUFACTURING COMPANY,
Plaintiff-Appellant,

v.

T.L. JAMES & CO., INC.,
Defendant-Appellee,

v.

POWERLINE SUPPLY CO., INC.,
Defendant Third Party
Plaintiff-Appellant,

and

Nelda S. ELLIOT, Bill Elliott, and Lance D. Alworth, Louisiana and Arkansas Railroad Co.,
Defendants-Appellants,

v.

Floyd Benjamin JAMES and George William James, Sr.,
Third Party
Defendants-Appellees.

No. 88-4901.

United States Court of Appeals,
Fifth Circuit.

Jan. 29, 1990.

* * * * *

Appeals from the United States District Court for the Western District of Louisiana.

Before GEE and JONES, Circuit Judges, and HUNTER, District Judge:*

* District Judge of the Western District of Louisiana, sitting by designation.

GEE, Circuit Judge:

Appellant contends that the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the Louisiana Environmental Quality Act ("LEQA") impose direct liability on parent corporations for violations of their wholly-owned subsidiaries. Appellant further contends that, absent such liability, the corporate veil should be pierced to impose liability in the instant case. We disagree with both contentions.

Facts

This case arises from the environmental cleanup of a former creosoting plant constructed by the Lincoln Creosoting Company, Inc. ("Lincoln") in Bossier City, Louisiana. Under Lincoln's creosoting recovery system, raw creosoting chemicals dripped from the treating cylinders to a sump pit located underneath the system. Lincoln recovered some creosoting chemicals from the sump. The remaining chemicals were discharged into an open ditch and flowed to the eastern portion of the site, where the chemicals collected in a slough. From the slough, the creosoting chemicals were washed away by rain to the surrounding land areas and waterways.

Lincoln was incorporated in 1935 when C.A. Tooke and J.R. Hayes proposed a business arrangement with T.L. James whereby T.L. James Co., ("James Co.") would put up the initial capital in return for stock in the company. Under the arrangement, Tooke and Hayes would purchase 40% of the 200 shares of common voting stock and James Co. would own 60% of the common stock and all 200 shares of the non-voting preferred stock of Lincoln. Tooke and Hayes endorsed their shares over as security for their unpaid capital subscription.

At the initial Board of Directors meeting, Tooke was elected Vice President and designated "General Manager with full power and discretion to conduct the affairs" of Lincoln. T.L. James was elected President; his son G.W. James later succeeded him. Lincoln originally established a seven member Board of Directors. Five of these directors were associated with James Co., Tooke and Hayes held the other two seats. Lincoln maintained separate financial books and a separate corporate banking account. Only Hayes and Tooke had check-signing authority. Lincoln regularly held shareholders and directors meetings.

Dissatisfied with Lincoln's performance in the mid-1940's, G.W. James bought out Hayes, G.W. James, then president of Lincoln, hired Lacy, a former James Co. employee to replace Hayes. In 1945 Lincoln reduced its Board of Directors to five. The new Board consisted of three Lincoln employees who had no ties to James Co. and two persons associated with James Co. In 1947, the Board expanded to eight members and consisted of four Lincoln employees and four persons associated with James Co.

Lincoln owned its own property and equipment, and maintained its own employees, payrolls, insurance, pension system, and workman's compensation program. Lincoln filed its own tax returns.

In 1950 Tooke died and Lincoln was sold to Joslyn Manufacturing Co. ("Joslyn"). Joslyn owned and operated the plant until Koppers Company, Inc. ("Koppers") purchased it in 1969. Koppers owned the plant until 1971. The property then passed through five separate owners, the last of which subdivided the property. Appellant Powerline Supply Company ("Powerline") purchased one of the subdivided lots in 1982. Appellant Alworth purchased one such lot in 1983. Appellant Louisiana and Arkansas Rail-

way Company ("Railway") owned property adjoining the plant site from 1923 through 1972.

Joslyn filed this action in the district court invoking that court's exclusive jurisdiction under Section 113(b) of the CERCLA. 42 U.S.C. Section 9613(b). Joslyn brought this action claiming that James Co. was liable under 42 U.S.C. Section 9607(a)(2) as an "owner or operator." Joslyn also advanced claims under the Louisiana Environmental Quality Act ("LEQA"). La.Rev.Stat.Ann. Section 30:2001 (West Supp. 1989). The defendants included James Co., Railway, and Powerline. Powerline filed third-party complaints against, *inter alia*, Lance Alworth; Alworth then filed a cross-claim against James Co.

The district court granted James Co.'s motion for summary judgment, concluding that Congress, in enacting CERCLA, did not intend an exception to the general rule in corporation law of limited liability. 696 F.Supp. 222.

Discussion

CERCLA provides in relevant part:

Section 107(a)(2), 42 U.S.C. Section 9607(a)(2), makes liable:

> (a) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of. . . .

"Owner or operator" is defined in the statute as:

> (20)(A)(ii) in the case of an onshore facility . . . any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of

> State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the facility.

42 U.S.C. § 9601(20).

Joslyn urges this court to read CERCLA's definition of "owner or operator" liberally and broadly to reach parent corporations whose subsidiaries are found liable under the statute. In doing so, Joslyn urges us to follow the several courts, including the Second Circuit, which have extended CERCLA liability to parents. *See New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *United States v. Mottolo*, 695 F.Supp. 615 (D. N.H. 1988); *Colorado v. Idarado Mining Co.*, 707 F.Supp. 1227 (D. Col. 1989); *Vermont v. Staco, Inc.*, 684 F.Supp. 822 (D. Vt. 1988); *Idaho v. Bunker Hill Co.*, 635 F.Supp. 665 (D. Idaho 1986). We decline to do so.

Significantly, CERCLA does not define "owners" or "operators" as including the parent company of offending wholly-owned subsidiaries. Nor does the legislative history indicate that Congress intended to alter so substantially a basic tenet of corporation law. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if it is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917). Joslyn asks this court to rewrite the language of the Act significantly and hold parents directly liable for their subsidiaries' activities. To do so would dramatically alter traditional concepts of corporation law. The "normal

rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey*, 474 U.S. 494, 501, 106 S.Ct. 755, 759, 88 L.Ed.2d 859 (1986). Any bold rewriting of corporation law in this area is best left to Congress.

Appellants have pointed this court to little in the legislative history of CERCLA to indicate that Congress intended to make such a significant chance in corporation law principles. Powerline points to an "inherent" underlying intent of Congress to hold those who profited from hazardous waste sites responsible for the cost of cleanup and a desire to effectuate a timely cleanup of these sites. As the Court noted in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 267, 99 S.Ct. 2753, 2759, 61 L.Ed.2d 521 (1979), *reh. denied*, 444 U.S. 889, 100 S.Ct. 194, 62 L.Ed.2d 126 (reviewing Court of Appeals' decision modifying longshoreman's preexisting rights), "[S]ilence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." Without an express Congressional directive to the contrary, common-law principles of corporation law, such as limited liability, govern our court's analysis. *See Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1428 (D.C. Cir. 1988).

If Congress wanted to extend liability to parent corporations it could have done so, and it remains free to do so. The Seventh Circuit recently declined to expand the "owner or operator" definition, although it recognized the policy benefits inherent in a broad reading of the Act's scope. *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155 (7th Cir. 1988) ("To the point that courts could achieve 'more' of the legislative objectives by adding to

the lists of those responsible, it is enough to respond that statutes have not only ends but also limits.").

As the district court observed, Congress is quite capable of creating statutes that hold shareholders or controlling entities liable for the acts of valid corporations. In fact, Congress adopted a "control" test in the next subsection of the statute. Under CERCLA, the term "owner or operator" is defined for facilities conveyed to state or local governments by bankruptcy, tax delinquency or abandonment, as "any person who owned, operated *or otherwise controlled* activities at such facility immediately" before conveyance. 42 U.S.C. Section 9601(20)(A)(iii) (emphasis added). No such "control" test appears in subsection (ii), the subsection at issue in this case, and we will imply none. Similarly, La.Rev.Stat.Ann. Section 30:2276 (West 1989 Supp.) does not impose direct liability on parent corporations for the acts of their subsidiaries.

Further, the facts here militate against piercing the corporate veil. Lincoln faithfully adhered to basic corporate formalities by keeping its own books and records and holding frequent shareholder and directors meetings. The daily operations of Lincoln and James Co. were separate. Hayes and Tooke were the most involved in the operations of Lincoln; neither was employed by James Co. Lincoln owned its own property, and the property was not used by James Co. Lincoln filed separate tax returns. Lincoln paid its own bills and made its own arrangement for employee benefits. The notes from the 1950 special shareholders meeting indicate that Lincoln operated quite independently from James Co.

The district court was correctly guided by our court's prior decision in *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014,

106 S.Ct. 1194, 89 L.Ed.2d 309 (1986). There are Circuit set out criteria for analyzing the issue of "control" in the parent/subsidiary context. In this case, the district court ran through the "laundry list" and properly found that the facts did not justify piercing the corporate veil. Veil piercing should be limited to situations in which the corporate entity is used as a *sham* to perpetrate a fraud or avoid personal liability. *See Jon-T, supra* at 691 (quoting *Baker v. Raymond International*, 656 F.2d 173, 179 (5th Cir. 1981) ("control required for liability under the 'instrumentality' rule amounts to total domination of the subservient corporation, to the extent that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation"). The facts in this case do not support a finding that Lincoln was designed as a bogus shell for James Co. to hide behind.

The district court allowed extensive discovery in this case. Appellants have pointed to those matters that they believe constitute a material issue of fact for determining whether James Co. can be held indirectly liable for Lincoln's activities. Those facts, if true, do not justify piercing the corporate veil. Therefore, the district court's grant of Jame Co.'s summary judgment motion was proper. We AFFIRM.

APPENDIX B

JOSLYN CORPORATION

v.

T.L. JAMES & COMPANY, INC., et al.

Civ. A. No. 87-2054.

United States District Court,
W.D. Louisiana,
Shreveport Division.

Sept. 19, 1988.

* * * * *

MEMORANDUM RULING

STAGG, Chief Judge.

Joslyn Corporation (hereinafter "Joslyn") initiated this action against, *inter alia*, T.L. James & Company, Inc. (hereinafter "T.L. James" or "James Company"), asserting an action under the Comprehensive Environmental Response, Compensation and Liability Act (hereinafter "CERCLA")[1] and the Louisiana Environmental Quality Act (hereinafter "LEQA").[2] The suit was instituted by Joslyn after the Louisiana Department of Environmental Quality had issued several orders to certain parties, including Joslyn, requiring the investigation and cleanup of a contaminated site in Bossier Parish, Louisiana that was

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[1] 42 U.S.C. §§ 9601-9657 (1982) and (Supp. V. 1987), *as amended by* Superfund Amendments and Reauthorization Act of 1986, Pub.L. No. 99-499, 100 Stat. 1613 (1986).

[2] La.Rev.Stat. 30:1051 *et seq.*

formerly a wood-treating and/or creosoting operation. The claims, cross claims, counterclaims and third party demands involved in this action are too numerous to list.

Presently under advisement are the following:

1. T.L. James's motion and renewed motion to dismiss plaintiff's complaint or, in the alternative, for summary judgment;
2. T.L. James's motion and renewed motion to dismiss the cross claim of Powerline Supply Company;
3. T.L. James's motion to dismiss the cross claim of the Louisiana and Arkansas Railway Company for failure to state a claim or, in the alternative, for summary judgment;
4. T.L. James's motion to dismiss the counterclaim of Lance D. Alworth; and
5. T.L. James's motion to dismiss the amended cross claim of Lance D. Alworth.

Though these motions present several issues, they all request the court to determine whether CERCLA imposes direct liability upon a parent corporation or requires a claimant to pierce the corporate veil before liability may attach. A recitation of material facts will be deferred until the court completes its analysis of this legal issue.

DIRECT OR DERIVATIVE LIABILITY?

Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides, in relevant part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this Section—
>
> * * * * * *

> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of [shall be liable under this Section].

Under 42 U.S.C. § 9601(20)(A), the term "owner or operator" means "in the case of an onshore facility or an offshore facility, any person owning or operating such facility." "Person" includes an "individual, firm, corporation, association, partnership . . . commercial entity. . . ." *Id.* at § 9601.

Joslyn[3] argues that T.L. James must be deemed an "owner or operator" under CERCLA § 107(a) and is, therefore, directly liable. CERCLA does not specifically address the question of whether a court may hold a parent corporation or corporate officers liable for clean-up costs without first piercing the corporate veil. Several courts addressing the issue have held that corporate officers may be individually liable for hazardous waste clean-up under CERCLA.[4] The undersigned respectfully declines to adopt the analysis utilized by these courts because they

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[3] For the sake of brevity, reference will only be made to Joslyn's position which has been adopted by all the nonmoving parties against whom motions are presently under consideration.

[4] *State of New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir.1985); *United States v. Ward*, 618 F.Supp. 884 (E.D.N.C. 1985); *United States v. Conservation Chemical Company*, 619 F.Supp. 162 (W.D.Mo.1985); *United States v. Mottolo*, 605 F.Supp. 898 (D.N.H.1985); *United States v. Carolawn Company*, 21 Env't Rep. Cas. (BNA) 2124 (D.S.C.1984); *United States v. Northeastern Pharmaceutical & Chemical Company (NEPAC-CO)*, 579 F.Supp. 823 (W.D.Mo.1984), *affirmed in part, reversed in part*, 810 F.2d 726 (8th Cir.1986); *United States v. Wade*, 577 F.Supp. 1326 (E.D.Pa. 1983). Also, in *Idaho v. The Bunker Hill Company*, 635 F.Supp. 665 (D.Id.1986), liability was imposed, without piercing the corporate veil, under CERCLA on a parent corporation held to be the "owner or operator" of a disposal facility.

have chosen to ignore the corporate form without an express congressional directive.

In *Berger v. Columbia Broadcasting System, Inc.*, 453 F.2d 991, 994 (5th Cir.1972), the Fifth Circuit made clear the importance of the corporate structure:

> It is elemental jurisprudence that a corporation is a creature of the law, endowed with a personality separate and distinct from that of its owners, and that one of the principal purposes for legal sanctioning of a separate corporate personality is to accord stockholders an opportunity to limit their personal liability.

See also, Baker v. Raymond International, Inc., 656 F.2d 173, 179 (5th Cir.1981) ("[t]he principle of limited liability remains a dominant characteristic of American corporate law."), *cert. denied*, 456 U.S. 983, 102 S.Ct. 2256, 72 L.Ed.2d 861 (1982); and *Krivo Industrial Supply Company v. National Distillers and Chemical Corp.*, 483 F.2d 1098, 1102 (5th Cir.1973) ("the corporate form . . . is not lightly disregarded since limited liability is one of the principal purposes for which the law has created the corporation."). In *Cort v. Ash*, 422 U.S. 66, 84, 95 S.Ct. 2080, 2090, 45 L.Ed.2d 26 (1975), the Supreme Court refused to create a federal private right of action for allegedly illegal corporate campaign contributions, holding that:

> Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.

In *Homan & Crimen, Inc. v. Harris*, 626 F.2d 1201, 1205 (5th Cir.1980), *cert. denied*, 450 U.S. 975, 101 S.Ct. 1506, 67 L.Ed.2d 809 (1981), Medenco, Inc. owned 100 per cent of the stock of Homan & Crimen, Inc., an unrelated

corporation doing business as Southwestern General Hospital. The hospital submitted its Medicare cost reports for two years, claiming $830,000 as a step-up in the cost basis of its assets. *Id.*[5] These were costs incurred by Medenco, Inc. In claiming entitlement to this amount, plaintiffs argued under 42 C.F.R. § 405.427 that "costs applicable to services, facilities, and supplies furnished to the provider by organizations related to the provider by common *ownership or control* are includable in the allowable cost to the provider at the cost to the related organization." *Id.* at 1208 (emphasis added).

Based upon this regulation, Homen & Crimen contended that "form should not be exalted over substance and the fiction of the separateness of the corporation and its shareholders should not be used to reach an unfair and unjust result." *Id.* The United States Court of Appeals for the Fifth Circuit rejected this argument:

> To this contention, the response must be that if the separateness of the corporation and its shareholders is a fiction, it is one which the law has long recognized and will not lightly go behind. [Citations omitted.] *For the regulation to cut through or ignore that mass of established corporate law upon which the Secretary relied would require at the very least a clear intention, a compelling case. It cannot be done by implication as plaintiffs suggest here.*

Id. (emphasis added.) Stated differently, "[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress." *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68, 86 S.Ct. 1301, 1304, 16 L.Ed.2d 369 (1966). "Even where there is related federal legislation in an area, as is true in this instance,

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[5] *See*, 42 U.S.C. §§ 1395X and 1395F.

it must be remembered that 'Congress acts . . . against the background of the total corpus juris of the states . . . ." *Id., quoting from* Hart and Wechsler, *The Federal Courts and the Federal System* at p. 435 (1953).[6]

Based upon the foregoing authorities, this court holds that the corporate form, including limited liability for shareholders, is a doctrine firmly entrenched in American jurisprudence that may not be disregarded absent a specific congressional directive. Neither the clear language of CERCLA nor its legislative history provides authority for imposing individual liability on corporate officers or direct liability on parent corporations.[7] Though it is recognized that CERCLA was enacted in the "waning hours of the 96th Congress," and was "the product of apparent legislative compromise [that] is not a model of clarity," *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir.1988), this court will not read into the statute a provision disregarding decades of corporate law. The court's conclusion is buttressed by the fact that Congress has, in the past, specified that share-

[6] *See also, Burks v. Lasker*, 441 U.S. 471, 478-79, 99 S.Ct. 1831, 1837-38, 60 L.Ed.2d 404 (1979) (holding that in actions asserting violations under the Investment Company Act and the Investment Advisors Act, federal courts must apply state corporate law governing the authority of independent directors to discontinue shareholders' derivative actions because corporate law is not an area in which these statutes authorize federal courts of "fashion a complete body of federal law); *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 413-14, 92 S.Ct. 2247, 2263-64, 33 L.Ed.2d 11 (1972) (refusing to pierce veil of union political fund despite evidence of control and domination, in view of compliance with formal statutory requirements).

[7] Comment, *Corporate Officer Liability for Hazardous Waste Disposal: What Are the Consequences?*, 38 Mercer L.Rev. 677, 679 (1987).

holders or controlling parties are to be held responsible for the acts or debts of a valid corporation. *See, e.g.*, Depository Institution Management Interlocks Act, 12 U.S.C. §§ 3201-3207; I.R.C. § 1239(b)(2), (3) (1976); Fair Labor Standards Act § 3(r), 29 U.S.C. § 203(r); and ERISA § 4001(b), 29 U.S.C. § 1301(b)(1); *see also*, 16 C.F.R. § 15.482 (1981). Absent a similar provision in CERCLA, this court finds no direct liability against James Company

THE RULE OF DECISION

It is undisputed that federal law governs in actions arising under nationwide federal programs. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726, 99 S.Ct. 1448, 1457, 59 L.Ed.2d 711 (1979). The question is whether state law should be adopted as the rule of decision or whether federal common law should control. As the Supreme Court has noted:

> That the statutes authorizing these federal lending programs do not specify the appropriate rule of decision in no way limits the reach of federal law. It is precisely what Congress had not spoken "in any area comprising issues substantially related to an established program of governmental operation, [citation omitted,] that *Clearfield* [*Trust Company v. United States*, 318 U.S. 363, 367, 63 S.Ct. 573, 575, 87 L.Ed. 838 (1943)] directs federal courts to fill the interstices of federal legislation according to their own standards."

440 U.S. at 727, 99 S.Ct. at 1458, *quoting from* Mishkin, *The Variousness of "Federal Law": Competence and Discretion and the Choice of National and State Rules for Decision*, 105 U.Pa.L.Rev. 797, 800 (1957). The normal course of analysis would require this court to apply the test set forth in *United States v. Kimbell Foods, Inc.*, *supra*, as explained by *Georgia Power Company v. San-*

ders, 617 F.2d 1112 (5th Cir.1980) (en banc), *cert. denied*, 450 U.S. 936, 101 S.Ct. 1403, 67 L.Ed.2d 372 (1981). This inquiry, however, is unnecessary because the Fifth Circuit has held:

> [W]e find no need to determine whether a uniform federal alter ego rule is required, since the federal and state alter ego tests are essentially the same. Our non-diversity alter ego cases have rarely stated whether they were applying a federal or state standard, and have cited federal and state cases interchangably.

United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 690 n. 6 (5th Cir.1985), *cert. denied*, 475 U.S. 1014, 106 S.Ct. 1194, 89 L.Ed.2d 309 (1986) (citations omitted)[8].

The Fifth Circuit in *Jon-T Chemicals* then proceeded to set forth general standards of piercing the corporate veil that have evolved in this circuit. In *Krivo Industrial Supply Company v. National Distillers & Chemical Corp.*, 483 F.2d 1098, 1102 (5th Cir.1973), the Fifth Circuit noted: "[o]ne of the most difficult applications of the rule permitting the corporate form to be disregarded arises when one corporation is sought to be held liable for the debts of another corporation." Unless the parent corporation expressly or impliedly assumes responsibility for the debts of the subsidiary, liability will attach only when the parent "misuses that corporation by treating it, and by using it, as a mere business conduit for the purposes of

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[8] For a view that state alter ego, as opposed to federal common law, will conflict with the purposes of CERCLA, *see*, Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 Harv.L.Rev. 986 (1986). Though the Court in *Jon-T* was faced with Texas law, the undersigned is satisfied that the principles utilized in this opinion would control whether Louisiana or federal common law governs. *See, infra*, at 232-33.

the dominant corporation." *Id.* Two elements are held to be essential:

> First, the dominant corporation must have controlled the subservient corporation, and second, the dominant corporation must have proximately caused plaintiff harm through misuse of this control.

Id. at 1103, *citing, inter alia, Berger v. Columbia Broadcasting System, Inc.*, 453 F.2d 991 (5th Cir.), *cert. denied*, 409 U.S. 848, 93 S.Ct. 54, 34 L.Ed.2d 89 (1972). The Court further held:

> The control required for liability . . . amounts to total domination of the subservient corporation, to the extent that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation.

Krivo, 483 F.2d at 1106. In so holding, the Fifth Circuit adopted the recommendation of Professor Fletcher:

> The control necessary to invoke what is sometimes called the 'instrumentality rule' is not mere majority or complete stock control but such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal.

Id., quoting from 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 43 (Perm. ed. rev. 1963). *See also, Jon-T Chemicals*, 768 F.2d at 691; and *Baker v. Raymond International, Inc.*, 656 F.2d 173, 180 (5th Cir.1981). In determining whether a parent corporation has exercised the requisite degree of control over a subsidiary to pierce the corporate veil, the Fifth Circuit has developed a laundry list of factors. These include whether:

(1) the parent and the subsidiary have common stock ownership;

(2) the parent and the subsidiary have common directors or officers;

(3) the parent and the subsidiary have common business departments;

(4) the parent and the subsidiary file consolidated financial statements and tax returns;

(5) the parent finances the subsidiary;

(6) the parent caused the incorporation of the subsidiary;

(7) the subsidiary operates with grossly inadequate capital;

(8) the parent pays the salaries and other expenses of the subsidiary;

(9) the subsidiary receives no business except that given to it by the parent;

(10) the parent uses the subsidiary's property as its own;

(11) the daily operations of the two corporations are not kept separate; and

(12) the subsidiary does not observe the basic corporation formalities, such as keeping separate books and records and holding shareholder and board meetings.

Jon-T Chemicals, 768 F.2d at 691-92 (citations omitted). Resolution of the alter ego issue is "heavily fact-specific" and requires an evaluation of the totality of the aforementioned factors. *Id.* at 694.

THE FACTS

This dispute is over the materiality of facts, not their existence. Lincoln Creosoting Company, Inc. (hereinafter "Lincoln") was incorporated in the State of Louisiana on December 4, 1935. The idea to form Lincoln came from Messrs. Tooke and Hayes, who approached Mr. T.L. James. Mr. James paid $20,110 for 120 shares of voting common stock of Lincoln and 200 shares of non-voting preferred stock. C.A. Tooke and J.R. Hayes received 40 shares each of the voting common stock of Lincoln for a total of 40 per cent of the Lincoln stock. All outstanding stock certificates, however, were accompanied by endorsements back to the James Company. The endorsements of Tooke and Hayes were to the effect that they have endorsed the stock to T.L. James "where it shall remain until such time as their earnings from dividends on the stock shall have repaid the par value of the stock."[9] Since Lincoln never paid any common stock dividends, James Company had control over 100 per cent of Lincoln's stock.

Lincoln's first board of directors consisted of seven members: Mr. T.L. James, Mrs. T.L. James Jr., Mr. G.W. James, Mr. Floyd B. James, Mr. C.A. Tooke, Mr. J.R. Hayes and Mr. V.A. Davidson. Excluding Messrs. Tooke and Hayes, all were officers, directors and/or shareholders of T.L. James & Company. At the first meeting of the Lincoln Board of Directors, Mr. Tooke, who was vice president

[9] This is evidenced by a letter from J.C. Love Jr. of T.L. James to the vice president of the National Surety Corporation dated May 25, 1948. The letter goes on to state: "While actually T.L. James & Company only owns 60 per cent of the capital stock, they do, as of this time, control the full 100 per cent and will continue to do so until such time as dividends may have repaid all the original value of 40 per cent owned by the operators." Joslyn Exhibit 8.

of Lincoln, was designated as general manager with full power and discretion to conduct the corporation's affairs.

The property at issue in this suit was purchased in Lincoln's name on December 17, 1935. At least since 1936, Lincoln had its own bank account at the Commercial National Bank in Shreveport. Checks were signed jointly by Messrs. Tooke and Hayes. From its inception, Lincoln frequently and periodically held separate meetings of the directors and shareholders. At the annual shareholders meetings, Mr. Tooke was responsible for making the report of the preceding year and outlining policy for the coming year.

Mr. T.L. James died in July of 1944. On September 11, 1944, the Lincoln directors met and chose Mr. G. William James as the successor-president of Lincoln. Mr. G. William James served as president of Lincoln from 1944 through 1950.

In 1943 and 1944, Lincoln lost money. In the summer or fall of 1944, Mr. G.W. James approached J.E. Lacy concerning employment with Lincoln. James offered Lacy $1,000 a month for three months to "go over there [to Lincoln] and see what was the matter with this plant, why it wasn't making any money."[10] Lacy accepted the job and worked for three weeks. Lacy surmised that the problem at Lincoln was an internal fight between Messrs. Tooke and Hayes. According to Lacy, "Hayes's ambition was to get out and get a plant of his own. So he was not doing the things he should be doing, and that left Tooke with the inability to make the plant operate properly."[11]

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[10] Deposition of Lacy at 15, Joslyn Exhibit 15.

[11] *Id.* at 16.

Subsequent thereto, Lacy was employed by Lincoln. This came about after G.W. James bought out Hayes' interest. Lacy was placed in charge of production. Lacy, however, was only on Lincoln's payroll and not that of T.L. James & Company. At a shareholders meeting on March 13, 1945, a resolution was passed thanking Hayes for his service to Lincoln and noting that Hayes was "the originator of the ideas which developed Lincoln."[12] At the same meeting, G.W. James was reelected president and Tooke was reelected vice president. V.A. Davidson was elected secretary, replacing Mr. Hayes.

At a directors meeting on October 8, 1945, a new resolution was passed pursuant to which Messrs. Tooke, Lacy and Plummer were authorized to sign checks on behalf of Lincoln.

At a special shareholders meeting on March 3, 1947, the number of directors was increased to eight. Four of these were Lincoln employees and four were affiliated with James Company. The four Lincoln employees were Tooke, Freeman, Lacy and Plummer.

A special board meeting was held on December 29, 1947, at which time it was agreed that due to rather substantial obligations of Lincoln, it would not be advisable to consider any common stock dividends on account of the 1947 earnings. Upon the motion of J.C. Love, however, it was agreed that $20,000 be presented to Centenary College toward the T.L. James Memorial Fund.

At the regular annual meeting of stockholders on March 9, 1948, Tooke reported that the "future of the treating

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[12] *See* Attachment "C" to T.L. James' Statement of Undisputed Facts at 67.

business is rather a vague picture." [13] The vagueness was due to the declining demand for creosoted products as the result of consumers' inability to secure wire and transformers. In addition, the creation of new creosoting plants was noted to have caused the supply of creosoted items to be unreasonably large. Despite this, Tooke stated his belief that the 1948 operations would be profitable. G.W. James commented at this meeting that he felt "the management of the creosoting business was to be commended for assuming such a logical attitude with reference to the forthcoming problems."[14]

At a special directors meeting held on December 16, 1949, a resolution was passed granting authority to any two among C.A. Tooke (vice president), H.R. Freeman (director) and W.W. Colbert (purchasing agent) to make withdrawals from Lincoln's corporate account at Commercial National Bank in Shreveport. This resolution was approved by G.W. James and Mr. Davidson.

Mr. Tooke died on May 4, 1950. As a result, a special meeting of Lincoln's Board of Directors was held on May 15, 1950. G.W. James stated that he "felt very keenly the loss of not only the sincere friendship, but the keen business judgment of C.A. Tooke."[15] Mr. James further stated that the purpose of the meeting was to try to decide what course should be followed without the leadership of Mr. Tooke. James stated that: "As everyone knew, Lincoln Creosoting Company had originally been organized through the efforts of Mr. Tooke and that it had been the attitude of those in Ruston that it was Mr. Tooke's enterprise and

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[13] *Id.* at 84.

[14] *Id.* at 85.

[15] *Id.* at 98.

had been since it was first organized." Without the leadership of Mr. Tooke, it was G.W. James' opinion and the opinion of those in Ruston that the business should be sold. It was agreed at the meeting that every effort should immediately be made to sell Lincoln. In the event that a purchaser could not be secured, it was agreed that plans would be made for an orderly liquidation. Since Mr. Lacy was most familiar with the general management of the business, it was agreed that he would assume the position formerly held by Mr. Tooke. It was then approved that Lacy's name would be added to the list of names of any two required signatures to withdraw funds from Lincoln's account. Floyd B. James stated that, "it was his opinion and that of the members he had spoken with that the corporation was indebted to Mr. Tooke for the development of the corporation from its infancy to its present status and that in view of these facts he moved that the corporation pay to Mrs. Tooke, the widow of C.A. Tooke, his salary for a period of twelve months. . . ."[16]

A special meeting of stockholders was held on July 20, 1950 for the purpose of considering the sale of Lincoln's principal assets. Mr. Lacy outlined a proposition to purchase Lincoln that had been made by Joslyn Manufacturing & Supply Company. After a general discussion of the proposal, a resolution was introduced by Mr. Plummer which authorized G.W. James to execute a memorandum agreement with Joslyn Manufacturing & Supply Company for the sale of Lincoln's physical plant and real estate, the entire black stock inventory, the entire white stock inventory, the entire stock of creosote oil and the entire account of usable transient freight. This resolution was

[16] *Id.* at 99.

unanimously adopted by the Board of Directors on July 20, 1950.

The shareholders voted on December 27, 1950 to repurchase as treasury stock 41 shares of common stock held by Messrs. Lacy, Freeman and Plummer, and the Tooke heirs. The shareholders also agreed that all 200 shares of preferred stock held by James Company, which were the original capitalization of Lincoln, should be redeemed at par value of $100 a share plus accrued dividends to the next dividend date.

At the March 20, 1951 annual meeting of the Board of Directors, Lacy advised that the transfer of Lincoln's properties to Joslyn Manufacturing Company was nearly complete and that all miscellaneous items of charge and credit had been settled. The only matter remaining to consummate the sale was the payment of the monthly amount, as provided for in the memorandum agreement. Mr. Lacy then summarized the outstanding business matters to be resolved and stated that, in his estimation, the entire affairs of the creosoting company should be completed well in advance of the close of the 1951 calendar year. The same eight directors who had served since 1947 were reelected, with the exception of C.A. Tooke Jr., who was elected to replace the late C.A. Tooke.

On November 26, 1951, the shareholders of T.L. James & Company, Inc. held a special meeting "to consider the desirability . . . of mak[ing] a contribution or donation from T.L. James & Company, Inc. to Centenary College of Louisiana . . . consisting of all shares of stock of Lincoln Creosoting Company, Inc. presently owned" by James Company.[17] A resolution was unanimously passed authoriz-

[17] *See*, Attachment "D" at 195 to T.L. James' Statement of Undisputed Facts.

ing this donation. The James Company Board of Directors approved this resolution on December 10, 1951.

On December 19, 1952, a Certificate of Dissolution was signed dissolving Lincoln. According to the Certificate, "all debts, obligations and liabilities of this corporation have been paid and discharged," that "there are no suits pending against this corporation in any Court," and that the assets have been distributed to the shareholders "in accordance with their respective rights and interests."[18]

ANALYSIS OF LAW AND FACTS

Joslyn urges that six of the twelve factors cited in *Jon-T Chemicals, supra,* support the conclusion that the corporate veil should be pierced. Specifically, Joslyn points out that the parent and subsidiary have common stock ownership as well as common directors. It is further urged by Joslyn that the positions held by G.W. James and Mr. Davidson constituted direct control over Lincoln's finances.[19] These facts are undoubtedly true and material:

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[18] Attachment "A" to T.L. James' Statement of Undisputed Facts.

[19] In support of this contention, Joslyn refers to two letters from G.W. James and V.A. Davidson to their accountant. The letters were written in regard to an IRS audit concerning these individuals' salaries from Lincoln. Contained in the letters are statements that these directors were consistently involved in the financial affairs of Lincoln, and that Mr. Davidson served as a contact between plant personnel and G.W. James. Though these letters evidence minimal control in financial affairs, they bear no weight in determining control over the nuts and bolts of Lincoln's operations and the day-to-day affairs. It must be remembered that the corporate veil will not be pierced unless the parent's control "amounts to total domination of the subservient corporation, to the extent that the subservient corporation manifests no separate corporate interest of its own and functions solely to achieve the purposes of the dominant corporation. *Krivo,* 483 F.2d at 1106. "Merely taking an active part in the management of the debtor corporation does not automatically constitute control. . . ." *Id.* at 1105.

> Nevertheless, our cases are clear that 100 per cent ownership and identity of directors and officers are, even together, an insufficient basis for applying the alter ego theory to pierce the corporate veil. [*Citing Nelson v. International Paint Company*, 734 F.2d 1084, 1092 (5th Cir.1984) and *Miles v. AT & T*, 703 F.2d 193, 195 (5th Cir.1983).] Instead, we maintain the fiction that an officer of director of both corporations can change hats and represent the two corporations separately, despite their common ownership.

Jon-T Chemicals, 768 F.2d at 691; *see also*, *Baker*, 656 F.2d at 180 ("Ownership of a controlling interest in a corporation entitles the controlling shareholder to exercise the normal incidence of stock ownership . . . without forfeiting the protection of limited liability."); and *Berger*, 453 F.2d at 994 (same).

Joslyn also points out that James Company made substantial loans to Lincoln, including the initial capitalization. The uncontroverted record establishes, however, that these loans were repaid. In any event, "the general rule is that the mere loan of money by one corporation to another does not automatically make the lender liable for the acts and omissions of the borrower." *Krivo*, 483 F.2d at 1104, *citing Peterson v. Chicago, Rock Island and Pacific Company*, 205 U.S. 364, 27 S.Ct. 513, 51 L.Ed. 841 (1907). Joslyn also asserts that the James Company hired and fired Lincoln's executive officers. This allegation is based upon the hiring of Lacy and the resignation of Hayes. Though this is minimally indicative of control, it can hardly be said to rise to the level justifying disregard of the corporate form. Indeed, "to justify a judicial derogation of the separateness of a corporate creature, an aggrieved party must prove something more than . . . the parent's use of its power as an incident of its stock owner-

ship to elect officers and directors of the subsidiary." *Berger*, 453 F.2d at 994.

Joslyn also takes issue with the fact that T.L. James Sr., G.W. James and V.A. Davidson worked out of James Company's corporate offices. Lincoln neither had a lease nor paid rent for the use of these offices. Once again, this is only marginally relevant. These individuals were officers of both corporations. Clearly, they had to work somewhere. That they chose to work out of James Company's corporate offices simply is not sufficient to disregard the separate corporate structures.

The lengthy factual account set forth above establishes beyond doubt that Lincoln strictly adhered to basic corporate formalities by keeping its own books and records and frequently and periodically holding shareholder and director meetings. The daily operations of Lincoln and James Company were kept separate. The driving forces behind Lincoln were Messrs. Hayes and Tooke, neither of whom was employed by James Company. Lincoln owned its own property where the physical plant was situated. This property was not utilized for the business of James Company. None of Lincoln's employees were on the payroll of James Company. Though James Company provided capital for Lincoln's initial incorporation, it was the effort and initiative of Messrs. Tooke and Hayes that resulted in the formation of Lincoln. Lincoln filed separate income tax returns.

In addition to these compelling facts, it should also be noted that Lincoln paid its own bills and made arrangements for employee benefits such as sick pay, retirement and profit sharing. Lincoln Creosoting's invoices directed that payment be made to Lincoln and not to James Company.

SUMMARY JUDGMENT STANDARDS

The purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses in the spirit of the rule requiring a just, speedy and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986); *Meyers v. M/V Eugenio C*, 842 F.2d 815, 816-17 (5th Cir.1988). Indeed, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole. . . ." *Celotex*, 106 S.Ct. at 2555, *citing* Fed.R.Civ.P. 1 and Schwarzer, *Summary Judgment Under The Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1984).

A party seeking summary judgment always bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 106 S.Ct. at 2553. A defendant moving for summary judgment may rest on the absence of evidence to support an essential element of the plaintiff's case. *Celotex*, 106 S.Ct. at 2554; *International Association of Machinists and Aerospace Workers, AFL-CIO, Lodge No. 2504 v. Intercontinental Manufacturing Company, Inc.*, 812 F.2d 219, 222 (5th Cir.1987). Once this burden has been established, the burden shifts to the nonmoving party to demonstrate a genuine issue of material fact. *Matsushita Electric Industrial Company v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). If the evidence is merely colorable or not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). In fact, the nonmoving party has an affirmative duty to come forth

with "significant probative evidence demonstrating the existence of a triable issue of fact." *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 877 (5th Cir.1984).

The summary judgment standard has been said to mirror that of Fed.R.Civ.P. 41(b) for involuntary dismissal in nonjury cases. *Professional Managers v. Fawer, Brian, Hardy & Zatzkis*, 799 F.2d 218, 223 (5th Cir.1986). In this respect, Judge Rubin has noted:

> If the decision is to be reached by the court, and there are no issues of witness credibility, the court may conclude on the basis of the affidavits, depositions, and stipulations before it, that there are no genuine issues of material fact, even though decision may depend on inferences to be drawn from what has been incontrovertibly proved . . . even if that conclusion is deemed 'factual' or involves a 'mixed question of law and fact.' A trial on the merits would reveal no additional data. Hearing and viewing the witnesses subject to cross-examination would not aid the determination if there are neither issues of credibility nor controversies with respect to the substance of the proposed testimony. The judge, as trier of fact, is in a position to and ought to draw his inferences without resort to the expenses of trial.

Nunez v. Superior Oil Company, 572 F.2d 1119, 1123-24 (5th Cir.1978).

The court is satisfied that James Company fulfilled its initial burden by first proving that liability will attach only if the corporate veil is pierced and then by establishing, through competent proof, facts showing that under the governing substantive law the corporate form should not be disregarded. Joslyn's rebutting facts and arguments, even considered in their totality, simply do not constitute significant probative evidence demonstrating a triable issue of fact. This is especially true in this nonjury case

where substantial discovery has been conducted. This court was particularly liberal in affording the parties ample opportunity to brief the legal issues and provide supporting documentation. Joslyn has not made the court aware of any uncompleted discovery which would be relevant toward the issue of derivative liability. Stated differently, Joslyn has not come forward with proof demonstrating a triable issue of fact as to whether the James Company exercised total domination over Lincoln to the extent that Lincoln manifested no separate corporate interest of its own and functioned solely to achieve the purposes of James Company. *Jon-T Chemicals*, 768 F.2d at 691; *Krivo*, 483 F.2d at 1106. There is simply no proof that James Company had complete domination of finances, policies and practices to cause Lincoln to be not a separate business entity but a mere conduit of James Company. *Id.*

Based on the foregoing, the court concludes that summary judgment be GRANTED in favor of T.L. James & Company, and that all claims against it be DISMISSED WITH PREJUDICE.[20] Assuming, without deciding, that

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[20] Though this court declined to follow that analysis utilized by the cases cited in footnote 4, *supra*, it is noteworthy that this court would have likely reached the same result under applicable corporate law at least in *Conservation Chemical*, *Mottolo* and *Shore Realty*. These cases involved factual situations where the personal participation in the illegal disposal of hazardous waste by the corporate officers was significant. As one commentator has noted, these "courts have avoided the common law rule of limited liability by either explicitly or implicitly applying a generally recognized exception; a corporate officer is liable for the wrongful acts of a corporation when he personally participates in the wrongful conduct." Comment, 38 Mercer L.Rev. at 685. If T.L. James & Company and its officers and directors had been actively involved in the day-to-day operations of Lincoln, including the disposal of hazardous waste, then, arguably, liability would attach. *See, generally, Shingleton v. Armor Velvet Corp.*, 621 F.2d 180 (5th Cir.1980); *L.C.L. Theatres, Inc. v. Columbia Pictures Industries, Inc.*, 619 F.2d 455 (5th Cir.1980); *Tillman v. Wheaton-Haven Recreation Associations, Inc.*, 517 F.2d 1141 (5th Cir.1975).

the LEQA is constitutional and Joslyn has satisfied prerequisites to filing an action, the foregoing analysis establishes that Joslyn cannot pierce the corporate veil under Louisiana law, which utilizes a similar if not more stringent rule than that applied in this opinion. *See, generally, GRW Engineers, Inc. v. Elam*, 504 So.2d 117, 120 (La. App. 2d Cir.1987), *writ denied*, 506 So.2d 1230 (La.1987); *Harris v. Best of America, Inc.*, 466 So.2d 1309, 1315 (La. App. 1st Cir.1985), *writ denied*, 470 So.2d 121 (La.1985); *Kingsman Enterprises, Inc. v. Bakersfield Electric Company, Inc.*, 339 So.2d 1280, 1282 (La.App. 1st Cir.1976); *Menard v. Associated Royal Crown Bottling Company*, 249 So.2d 363, 364-65 (La.App. 4th Cir.1971). Accordingly, summary judgment must be GRANTED in favor of T.L. James & Company with respect to claims against it under LEQA.

An order consistent with the terms of this memorandum ruling shall issue herewith.

APPENDIX C

[Dated March 26, 1990]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4901

JOSLYN MANUFACTURING COMPANY,
Plaintiff-Appellant,

v.

T.L. JAMES & CO., INC.,
Defendant-Appellee,

v.

POWERLINE SUPPLY CO., INC.,
Defendant Third Party
Plaintiff-Appellant,

and

Nelda S. ELLIOT, Bill Elliott, and Lance D. Alworth, Louisiana and Arkansas Railroad Co.,
Defendants-Appellants,

v.

Floyd Benjamin JAMES and George William James, Sr.,
Third Party
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana

ON PETITION FOR REHEARING

(March 26, 1990)

Before GEE and JONES, Circuit Judges, and HUNTER, District Judge:*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF
THE MANDATE

* District Judge of the Western District of Louisiana sitting by designation.

APPENDIX D

CERCLA

42 U.S.C. § 9601

(9) "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel;

. . .

(20)(A) The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

. . .

(21) The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

APPENDIX E

CERCLA

42 U.S.C. § 9607

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

APPENDIX F

CERCLA

42 U.S.C. § 9613

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607 of this title.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOSLYN MANUFACTURING COMPANY,
Petitioner,

v.

T.L. JAMES & COMPANY, INC.,
Respondent,

and

POWERLINE SUPPLY CO., INC.,
Petitioner,

v.

T.L. JAMES & COMPANY, INC.,
Respondent.

OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Respondent submits that the question presented for review is whether Congress, when it defined the term "owner or operator" in § 101(20)(A)(ii) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") as a "person owning or operating" a facility, intended—without so stating—to repudiate the traditional corporation law principle of limited liability, and thus make a parent corporation liable as the "owner or operator" of a facility that its subsidiary actually owns and operates, under circumstances in which fundamental rules of corporation law would not hold the parent responsible for its subsidiary's statutory or common law liabilities.

STATEMENT UNDER RULE 29.1

Respondent T.L. James & Company, Inc. is a closely-held corporation incorporated in the State of Louisiana and headquartered in Ruston, Louisiana. Respondent has no parent corporation, and all of its subsidiary corporations are wholly owned.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Nos. 89-1973 and 90-69

JOSLYN MANUFACTURING COMPANY,
Petitioner,

v.

T.L. JAMES & COMPANY, INC.,
Respondent,

and

POWERLINE SUPPLY CO., INC.,
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v.

T.L. JAMES & COMPANY, INC.,
Respondent.

OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

I. THE RULING BELOW

The Fifth Circuit's ruling below, affirming a grant of summary judgment in favor of respondent T.L. James & Company, Inc., is the *first* and *only* decision in the United States courts of appeals addressing the liability under CERCLA of parent corporations for

claims arising out of the conduct of their subsidiaries. As such, there is not and cannot be any conflict among the circuits.

Congress made the "owner or operator" of a pollution site liable for its cleanup. The Fifth Circuit observed that Congress had defined the term "owner or operator" as any "person owning or operating." Rejecting petitioners' argument that a parent company is the "person owning or operating" a subsidiary's facility, the court below held that Congress had given no indication in its definitional language that it "intended to alter so substantially a basic tenet of corporation law." 893 F.2d at 82. Applying the traditional tools of statutory construction—the plain meaning rule, examination of legislative history, examination of the legal background against which Congress acted, and comparison of other sections of the statute with petitioners' suggested reading of the instant section—the court of appeals concluded that Congress intended the courts to apply the federal common law of corporations to questions of parent-subsidiary liability arising under CERCLA. In this case, application of that federal common law rule resulted in a finding that the facts did not justify ignoring the separateness of Lincoln Creosoting Company, Inc., the subsidiary, and T.L. James & Company, Inc., the parent. That ruling, and the reasoning used to reach it, was fully correct.

II. THE FACTS OF RECORD

The U.S. District Court for the Western District of Louisiana, after complete discovery, entered summary judgment for respondent T.L. James & Company, Inc. ("James Co."), 696 F. Supp. 222 (W.D. La. 1988), based on what the Fifth Circuit found to

be an "extensive" factual record. 893 F.2d at 84. The facts that follow are drawn solely from the findings of the lower courts[1] or are taken from the corporate minute book of Lincoln Creosoting Company, Inc. ("Lincoln"), which was part of the undisputed record in the district court.

Lincoln Creosoting Company, Inc. was incorporated in 1935. C.A. Tooke and J.R. Hayes approached Mr. T.L. James with the proposal that if he would put up the initial capital they would purchase land, and build and operate a creosoting business. It was agreed that Tooke and Hayes would own 40% of the 200 shares of voting common stock, and that James Co. would own 60% of the common stock and all 200 shares of the non-voting preferred stock. James Co. apparently paid the entire initial capitalization, and Tooke and Hayes endorsed their shares back to James Co. as security for their unpaid capital subscription.[2] Shortly thereafter Lincoln purchased the property at issue in this suit in its own name. Tooke signed the purchase note for Lincoln.

At the initial meeting of the Lincoln Board of Directors on December 17, 1935, Tooke was elected Vice President and designated "General Manager with full power and discretion to conduct the affairs" of Lincoln. Hayes became Treasurer. The business was

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[1] *See* 696 F. Supp. at 227-31; 893 F.2d at 81-82

[2] Both petitioners suggest that this security arrangement constituted a transfer of ownership or control of the shares. *E.g.*, Joslyn Petition 2; Powerline Petition 3. In light of the facts that Tooke and Hayes were later able to transfer ownership of some of their shares, regularly voted their shares, and ultimately received the appreciated value of their shares, petitioners' suggestions are incorrect.

built on the Bossier City property selected by Tooke, who lived across the river in Shreveport (James Co. was based in Ruston, some 65 miles away), and in May, 1936, Lincoln opened its corporate bank account in Shreveport. Only Hayes and Tooke (not Mr. T.L. James) had check-signing authority.

The facts demonstrate that "Lincoln operated quite independently from James Co." 893 F.2d at 83. From 1935 to 1950, when its business was sold, Lincoln observed all the formalities of a separate corporation as meetings were held and memorialized, and detailed and separate financial books and records kept. In 1942 and 1943, minority shareholder participation broadened as two key Lincoln employees, H.R. Freeman (Sales and Marketing Manager) and J.B. Plummer (accounting), purchased 13 shares of Lincoln stock from Tooke and Hayes; Freeman and Plummer later became members of the Lincoln Board.

In July, 1944, T.L. James died, and the Lincoln Board elected his son, G.W. James, as President of Lincoln. G.W. James soon became concerned about Lincoln's losses in 1943 and 1944 and called upon his cousin, J.E. Lacy, for help in determining the cause. When Lacy reported back that Hayes's lack of commitment was the problem, James Co. bought out Hayes. In late 1944, G.W. James, as President of Lincoln, hired Lacy to replace Hayes; as his condition of accepting the position, Lacy became the owner of all Hayes's Lincoln stock at the price paid to Hayes by James Co. At the ensuing Lincoln Board and shareholders meetings on March 13, 1945, Lacy was elected director and treasurer.

At the same March, 1945, shareholders meeting, a five-person Board of Directors was elected, replacing

the original seven-member Board. The new Board consisted of three Lincoln employees (Tooke, Lacy and Freeman) and only two persons associated with James Co. From that time on, officers or directors of James Co. never again constituted a majority on the Lincoln Board.[3] In 1947, the Board was expanded to eight—four Lincoln employees/minority shareholders (Tooke, Lacy, Freeman and Plummer) and four persons also associated with James Co. This Board remained in office until Lincoln was dissolved.

By 1947, Lincoln had become a substantial company with earnings over $400,000, and total capital exceeding $600,000. Lincoln had its own property, employees, payrolls, equipment, accounts, letterhead, insurance, pension system, sick pay system and workman's compensation program, none of which was directed by or shared with James Co. Lincoln always filed separate income tax returns—in 1947 it paid more than $160,000 in taxes—and was not consolidated with the returns or accounting system of James Co.

On May 4, 1950, C.A. Tooke died. At a special meeting of the Lincoln Board on May 15, 1950, G.W.

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[3] Petitioner Powerline Supply Co., Inc. ("Powerline") incorrectly claims in its Petition that "[a]t all times, James Company controlled a majority of Lincoln's directors." Powerline Petition 5. Petitioner Joslyn Manufacturing Company ("Joslyn") similarly claims, based on Lacy's lineage, that "[w]ith Lacy's vote, James Company continued to control Lincoln's Board. . . ." Joslyn Petition 3. Both the district court, 696 F. Supp. at 228-29, and the court of appeals, 893 F.2d at 81, specifically rejected petitioners' family relations theory of corporation law, finding that Lacy—who had no position with James Co.—was a bona fide minority shareholder and Lincoln officer.

James led a discussion concerning the future of Lincoln "without the leadership of Mr. Tooke."

> He stated that, as everyone knew, Lincoln Creosoting Company had been originally organized through the efforts of Mr. Tooke and that it had been the attitude of those in Ruston [where James Co. was headquartered] that it was Mr. Tooke's enterprise and had been since it was first organized... He stated further that he felt without Mr. Tooke it was the opinion of those in Ruston that the business should be sold, as no one here was interested in assuming the managership of the creosoting business....
>
> A complete discussion at great length followed, with complete expressions being offered by Mr. Lacy, Mr. Tooke [Jr.], Mr. Plummer and Mr. Freeman. Following this thorough discussion, it was agreed that we should immediately make every effort to sell the business....

Lacy then came into contact with petitioner Joslyn and a deal was negotiated. Joslyn purchased the real estate and other assets on August 1, 1950. As Lincoln's business was being wound up and the transfer of accounts to Joslyn completed, Lincoln repurchased as treasury stock some of the minority holdings of Freeman, Plummer, Lacy, and the Tooke heirs, paying $2,250 per common share.[4]

In November, 1951, sixteen months after the sale of assets to Joslyn, the shareholders of James Co.

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[4] In light of this fact, Powerline's claim that Lincoln was "a wholly owned subsidiary of James Company," Powerline Petition 3, is flatly incorrect.

voted to make a "donation from T.L. James & Company, Inc. to Centenary College of Louisiana . . . consisting of all shares of stock of Lincoln Creosoting Company, Inc. presently owned" by James Co. In December, 1951, Centenary College became the majority shareholder of Lincoln.

At the ensuing Lincoln shareholders meeting of December 18, 1951, attended by Lacy, Plummer, Freeman, Tooke's widow and son, and Paul M. Brown on behalf of Centenary College, it was decided to liquidate Lincoln. The Certificate of Dissolution, filed with the Louisiana Secretary of State, noted that "all debts, obligations and liabilities" of Lincoln had been paid and discharged. The assets were then distributed to the shareholders—Lacy, Freeman and Plummer, the heirs of Tooke, and Centenary College—"in accordance with their respective rights and interests."

ARGUMENT

I. BECAUSE THIS IS THE ONLY CASE TO BE DECIDED IN THE COURTS OF APPEALS ON THE QUESTION OF PARENT-SUBSIDIARY LIABILITY UNDER CERCLA, THERE IS NO CONFLICT AMONG THE CIRCUITS

Both petitioners argue that this Court should issue writs of certiorari because of an alleged conflict in the federal courts of appeals on the question of whether, and if so, under what test, a parent corporation is liable under CERCLA as an "owner or operator" of a facility actually owned and operated by its subsidiary. Each petitioner cites *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985), as the conflicting decision; Powerline also asserts that *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 743-44 (8th

Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), is in conflict.

The Fifth Circuit ruling that is the subject of these petitions is the *first* and *only* appellate decision on the question of a parent corporation's liability for a subsidiary corporation's cleanup costs under CERCLA.[5] There is no "conflict with the decision of an-

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[5] The following opinions regarding parent-subsidiary liability under CERCLA, at various procedural stages, have been issued in the district courts:

City of New York v. Exxon Corp., 31 Env't Rptr. Cas. (B.N.A.) 1412 (S.D.N.Y. 1990) (holding parent liable on summary judgment as "transporter" under § 107(a)(4)); *United States v. Kayser-Roth Corporation*, 724 F. Supp. 15 (D.R.I. 1989), *appeal pending*, 1st Cir. No. 90-1190 (entering judgment for plaintiff following trial); *United States v. McGraw-Edison Co.*, 718 F. Supp. 154 (W.D.N.Y. 1989) (denying parent's motion for summary judgment); *United States v. Nicolet, Inc.*, 712 F. Supp. 1193 (E.D. Pa. 1989) (denying parent's motion to dismiss); *Rockwell Int'l Corp. v. IU International Corp.*, 702 F. Supp. 1384 (N.D. Ill. 1988) (denying parent's motion to dismiss); *Vermont v. Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988) (granting plaintiff's motion for summary judgment); *In Re Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution*, 675 F. Supp. 22 (D. Mass. 1987) (granting parent's motion to dismiss); *Colorado v. Idarado Mining Co.*, 18 Env't L. Rptr. (E.L.I) 20578 (D. Col. 1987) (granting State's motion for summary judgment); *Idaho v. Bunker Hill Corp.*, 635 F. Supp. 665 (D. Idaho 1986) (granting State's motion for summary judgment).

There are numerous other cases addressing the liability of officers, employees, directors, and other individuals with a role in a corporation—including *New York v. Shore Realty* and *United States v. Northeastern Pharmaceutical & Chemical*, *supra*—as well as numerous decisions involving the liability of successor corporations. Though some courts have failed to observe the appropriate distinctions, these two classes of cases present different issues than are involved in the instant petitions.

other United States court of appeals on the same matter." Supreme Court Rule 10.1(a).

The Second Circuit case of *New York v. Shore Realty, supra,* does not involve a parent corporation at all. In *Shore Realty,* a closely-held corporation, all the stock of which was owned personally by Donald LeoGrande, purchased a waste storage site. Mr. LeoGrande personally managed the waste operation at the property, including authorizing waste to be brought to the site. The Second Circuit held that he was personally liable as the "operator" because, "[i]n any event," he was "in charge of the operation" and "specifically directs, sanctions, and actively participates" in the corporation's waste operation. 759 F.2d at 1052.[6] No parent corporation existed, no parent-subsidiary issues were discussed in the opinion, and no parent corporation was held liable in *Shore Realty.*

The Eighth Circuit's decision in *Northeastern Pharmaceutical & Chemical ("NEPACCO"), supra,* cited as conflicting by petitioner Powerline, also does not involve a question of parent-subsidiary liability. Moreover, *NEPACCO* also does not involve the subject of

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[6] Petitioner Joslyn quotes a portion of the opinion in the court below in which the court, in the course of summarizing Joslyn's contentions, includes *Shore Realty* along with four district court decisions as cases that "have extended CERCLA liability to parents." 893 F.2d at 82. While, in a sense, *Shore Realty* "extended" CERCLA liability to an individual stockholder of a corporation, it did so on the ground that the sole stockholder, as an *individual,* actively and personally managed the waste operation at the site. That holding does not conflict with the holding of the Fifth Circuit in the instant case that the fundamental rule of corporate limited liability has not been displaced by CERCLA § 101(20)(A)(ii).

"owner or operator" liability, the issue in the instant case. The *NEPACCO* appellate court held only that John Lee (the plant manager and a minority shareholder) was *personally* liable under § 107(a)(3), 42 U.S.C. § 9607(a)(3), as a "person who arranged for disposal" of wastes. Mr. Lee was not held liable under § 107(a)(2) as an "owner or operator." The Eighth Circuit based its ruling on standard federal common law grounds—that Mr. Lee "personally participated in the [corporation's] wrongful conduct." *See* 810 F.2d at 744, *citing Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir. 1978) (officer liable under federal common law for participating in corporation's Lanham Act violation). Again, no parent corporation was involved in the litigation and no issue of parent liability for subsidiary conduct was addressed in the Eighth Circuit's opinion.

II. THE FIFTH CIRCUIT CORRECTLY INTERPRETED CERCLA AND CORRECTLY APPLIED A UNIFORM FEDERAL COMMON LAW TEST FOR PARENT-SUBSIDIARY LIABILITY

A. The Language Of The Statute And Its Legislative History Contain No Hint That Fundamental Corporation Law Principles Should Not Apply

Joslyn brought this action claiming that James Co. was liable under § 107(a)(2), 42 U.S.C. § 9607(a)(2), which makes liable:

> (2) any person who at the time of disposal of any hazardous substance *owned or operated* any facility at which such hazardous substances were disposed of. . . .

(Emphasis added.) "Owner or operator" is a defined term:

> (20)(A) The term "owner or operator" means . . . (ii) in the case of an onshore facility . . . *any person owning or operating* such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility.

CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (emphasis added). Thus, for an onshore facility, like the one at issue here, an "owner" is "any person owning" and an "operator" is "any person . . . operating" that facility. There is an exemption for titled holders of a "security interest."

The CERCLA definition of "owner or operator" and the "security interest" exemption attached to it are traceable in the legislative history to separate provisions in the original Senate and House bills. The original Senate bill, 96th Cong., S. 1480, provided in Section 2(1) thereof that the term "owner or operator" "shall have the meaning provided in Section 311(a)" of the Clean Water Act.[7]

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[7] Section 311(a)(6) of the Clean Water Act, 33 U.S.C. § 1321(a)(6), provided that "owner or operator" means "(B) in the case of an onshore facility . . . any person owning or operating such onshore facility. . . ." This is the exact definitional language now found in CERCLA § 101(20)(A)(ii). In the only case to address parent-subsidiary liability under § 311 of the

The original House bill on this subject, 96th Cong., H.R. 85, introduced six months before the Senate bill, expressly exempted from its definition of "owner," any person "who, without participating in the management or operation of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." H.R. 85, § 101(x). This provision is the source of the "security interest" exemption in CERCLA § 101(20)(A).[8]

In light of the statutory language, and the absence in the legislative history of any suggestion that a parent corporation should be liable when traditional corporation law principles would not impose liability, it is not surprising that *neither petitioner offers a single citation to the legislative record* regarding this definition to support their claims about what Congress "intended." Congress expressed no intent to depart from fundamental corporation law.

Clean Water Act, the court applied traditional common law veil-piercing rules in finding a parent corporation liable for conduct by its subsidiaries. *United States v. Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110 (D. Vt. 1973), *aff'd mem.*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974).

[8] "Congress intended by this [security interest] exception to exclude . . . common law title mortgagees from the definition of 'owner' since title was in their hands only by operation of the common law." *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 579 (D. Md. 1986). *See also id.* at 580 (discussing H.R. Rep. No. 172, Part 1, 96th Cong., 1st Sess., at 36 (1979), and concluding that "Congress intended to protect banks that hold mortgages in jurisdictions governed by the common law of mortgages. . .").

B. Congress Acts Against The Background Of The Common Law And Its Silence Is A Strong Indication That Traditional Common Law Rules Should Apply

Congress defined "owner or operator" in CERCLA § 101(20)(A)(ii), by reference to everyday concepts—persons "owning" and "operating." It did not suggest in the legislative history that the words were not to have their usual meanings. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if it is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Thus, "[s]tatutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them." *Id.*

Adherence to this rule has special import when Congress has used terms with a well-understood common law meaning. *See Morisette v. United States*, 342 U.S. 246, 263 (1952). In such a case, the "normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey*, 474 U.S. 494, 501 (1986). Rejecting a suggestion that a 1972 longshoremen's statute had *sub silentio* changed a traditional concept of tort liability, this Court observed that "the reports and debates leading up to the 1972 Amendments contain not a word of this concept. *This silence is most eloquent, for such reticence while contemplating [what would be] an important and controversial change in existing law is unlikely.*" *Edmonds v. Cam-*

pagnie Generale Transatlantique, 443 U.S. 256, 267 (1979), *reh. denied*, 444 U.S. 889 (emphasis added).[9]

C. Congress Knows How To Disregard the Corporate Form If It Desires And, Indeed, Did So In The Next Subsection Of CERCLA Itself.

The district court observed that its conclusion that Congress had not intended silently to override traditional corporation law "is buttressed by the fact that Congress has, in the past, specified that shareholders or controlling parties are to be held responsible for the acts or debts of a valid corporation." 696 F. Supp. at 226. The district court cited four statutes where Congress had explicitly determined to ignore the corporate form. There are many other examples, including, the court of appeals found, 893 F.2d at 83, one in the *very next clause of the very definition at issue in this case.*

"Owner or operator" is defined in CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A). In the case of an "onshore facility," like the one at issue here, the applicable provision is in clause (ii)—an "owner or operator" is "any person owning or operating." By contrast, in case of a facility conveyed to a state or local government due to bankruptcy, tax delinquency or abandonment, the applicable definition is in clause

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[9] In light of these cases, Joslyn's heavy reliance on a New Hampshire district court's finding that the "absence of explicit statutory language addressing the effect of incorporation . . . lead[s] the court to the conclusion that CERCLA places no importance on the corporate form," is misplaced. *United States v. Mottolo*, 695 F. Supp. 615, 624 (D.N.H. 1988), *quoted at* Joslyn Petition 11. What the New Hampshire court has done, of course, is to turn the law on its head—congressional silence affirms traditional corporation law, not repeals it.

(iii)—an "owner or operator" is "any person who owned, operated *or otherwise controlled* activities at such facility immediately befor[e]" conveyance. CERCLA § 101(20)(A)(iii), 42 U.S.C. § 9601(20)(A)(iii) (emphasis added). Congress expressly reached out to include a "control" test in clause (iii) for this limited circumstance of facilities abandoned to state or local governments. Since "[n]o such 'control' test appears in subsection (ii)"—the *immediately preceding* clause—the court below held, "we will imply none." 893 F.2d at 83. The simple solution (should one be needed or desired) constitutionally belongs to the legislative branch not the judiciary: amend § 101(20)(A)(ii) to include a "control" test.

Both petitioners argue that because CERCLA is a remedial statute, this Court's "interpretation" should, for policy reasons, broaden CERCLA's scope. In dozens of cases, though, both this Court and the courts of appeals have read remedial statutes against their common law background and have declined invitations radically to rewrite such statutes. *E.g.*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 198-201 (1976) ("remedial purpose" of Securities Exchange Act not sufficient to "add a gloss to the operative language of the statute quite different from its commonly accepted meaning"); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967) (Civil Rights Act did not silently abolish common-law immunities); *DeBrecini v. Graf Brothers Leasing, Inc.*, 828 F.2d 877, 879-80 (1st Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988) (remedial purpose of ERISA not sufficient to alter "background norm" of shareholder's limited liability); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 156-57 (7th Cir.

1988) (CERCLA's purpose does not justify ignoring its limited language).

D. The Fifth Circuit Properly Applied A Uniform Federal Common Law Rule

Because Congress did not address the question of parent-subsidiary liability in clause (ii) of its definition of "owner or operator," the court below applied the uniform federal common law of corporations found in *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986). In doing so, the court below complied with CERCLA's legislative history directive "that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law." 126 Cong. Rec. at S14964 (Nov. 24, 1980) (Statement of Sen. Randolph).[10] *See also Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 839 (1989) (applying federal common law to question of successor corporation's liability as CERCLA "owner or operator").

Petitioner Joslyn states repeatedly, but inaccurately, that the court below "relied solely on a state law 'alter ego' analysis." *E.g.*, Joslyn Petition 12; *see also id.* at ii (second question presented: should CERCLA be implemented under a "federal common law analysis, rather than state law"); *id.* at 9 (lower courts "limited their attention to whether Lincoln's . . . veil should be pierced under state law"). *United States v. Jon-T Chemicals*, relied upon by the court below, however, is definitively a federal common law case:

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[10] Because Sen. Randolph was co-sponsor and floor manager of the legislation, his statements have substantial weight. *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

> [W]e find no need to determine whether a uniform federal alter ego rule is required [to be created], since the federal and state alter ego tests are essentially the same. Our non-diversity alter ego cases have rarely stated whether they were applying a federal or state standard, and have cited federal and state cases interchangeably.

Jon-T Chemicals, 768 F.2d 686, 690 n.6.

Jon-T Chemicals involved a cost recovery claim by the United States against a parent corporation under a federal statute, the False Claims Act. Explicitly observing that the "case involves 'rights of the United States arising under nationwide programs,' " *id.*, *quoting United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979), the *Jon-T Chemicals* court found that the traditional corporation law was the uniform federal rule. The *Jon-T Chemicals* rule fully effectuates the federal interest in cost recovery while giving due regard both to the strength of the States' federalism interests in not having their laws unnecessarily upset and to the constitutional inhibitions that compel judicial deference to Congress's choice to leave the common law in place. *Kimbell Foods*, *supra* at 729; *United States v. Yazell*, 382 U.S. 341, 352-53 (1966); *Georgia Power Co. v. Sanders*, 617 F.2d 1112, 1118, 1127-28 (5th Cir. 1980) (en banc) (Faye, J., concurring), *cert. denied*, 450 U.S. 936 (1981).

Both the district court and the Fifth Circuit properly applied the federal common law analysis of *Jon-T Chemicals*—a case involving a cost recovery claim under a federal statute by the United States against a convicted thief—to Joslyn's CERCLA claim against

James Co. Joslyn's second asserted question in its petition is thus erroneously premised.

CONCLUSION

The ruling of the Fifth Circuit, as the first and only one by a court of appeals on the question of parent-subsidiary liability under CERCLA, is not in conflict with the decision of any other United States court of appeals on the same matter. Further, the Fifth Circuit properly discerned congressional intent and properly applied a federal common law test of parent-subsidiary liability. The petitions for writs of certiorari should be denied.

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Dated: July 18, 1990

No. 89-1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOSLYN MANUFACTURING COMPANY, *Petitioner,*

v.

T. L. JAMES & COMPANY, INC., *Respondent.*

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ARGUMENT

I.

There Is Conflict Among The Circuits As To The Circumstances In Which A Shareholder Is Directly Liable As An "Owner Or Operator" Under CERCLA.

James Company argues the Fifth Circuit's decision in this case is the only circuit court opinion deciding a parent corporation's liability under CERCLA as an "owner or operator" of its subsidiary's hazardous waste facility.[1] This overly cramped analysis must be rejected.

[1] James Company admits in footnote 5 at page 8 of its brief that several district courts have decided this issue.

In *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985), the Second Circuit found an individual shareholder, LeoGrande, directly liable as an "owner or operator" due to his ownership of stock in Shore Realty Corporation and his active participation in its management. *Shore's* reasoning equally applies to a corporate shareholder. CERCLA defines an "owner or operator" as "any person owning or operating such facility . . ." The Act defines "person" to include both individuals *and* corporations. 42 U.S.C. Sec. 9601(21).

Joslyn urged below that James Company was directly liable as an "owner or operator" under the *Shore* analysis: James Company owned a controlling interest in its subsidiary Lincoln and actively participated in managing Lincoln's facility. The Fifth Circuit expressly refused to follow *Shore* and found that a shareholder could only be liable if its corporation was a sham. See *Joslyn Manufacturing Co. v. T. L. James & Company*, 893 F.2d 80, 82 (5th Cir. 1990).

The Eighth Circuit's opinion in *NEPACCO* also conflicts with the Fifth Circuit decision. James Company properly points out at page 10 of its brief that the Eighth Circuit reversed the district court's finding that a NEPACCO shareholder and officer, Lee, was liable as an "owner or operator." However, that reversal was based on the fact NEPACCO did not own the site being cleaned up, not because the Eighth Circuit disagreed with the district court's conclusion that a person who owns an interest in a facility and actively participates in its management can be held liable as an "owner or operator."[2] (See pages 7-9 of

[2] If anything, the district court in *NEPACCO* went even further than *Shore* by suggesting that "owner or operator" liability could

(Footnote continued on following page)

Joslyn's petition.) In fact, the Eighth Circuit cited *Shore's* holding that a "shareholder-manager" can be liable under CERCLA to support, by analogy, its finding that NEPACCO's president and major shareholder, Michaels, was liable under the Resource Conservation and Recovery Act. See *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 745 (8th Cir. 1986).

The recent Eleventh Circuit decision in *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), also conflicts with the Fifth Circuit position. In that case, the government brought suit against Fleet Factors Corporation ("Fleet"), the secured creditor of a company which had owned and operated a hazardous waste facility. Fleet moved for summary judgment on the grounds, *inter alia*, it was 1) not an operator of its debtor's facility and 2) it was exempt from liability as a secured creditor under 42 U.S.C. Sec. 9601(20)(A) because it had not participated in the management of the facility. The trial court denied Fleet's motion and granted its request for interlocutory appeal, finding its order "disposes of controlling questions of law concerning which there is substantial doubt, including, but not limited to, my construction of CERCLA's definition of "owner and operator" and the secured lender exemption contained in that definition . . ." *Id.*, 1554, ftn. 2.

The Eleventh Circuit affirmed. It noted the "essential policy underlying CERCLA is to place the ultimate responsibility for cleaning up hazardous waste on those responsible for problems caused by the disposal of chemi-

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[2] *continued*
be imposed not only for actual participation but also if a person had the *capacity* to discover the pollution, the *power* to direct the activities of those controlling the mechanisms causing the pollution; and the *capacity* to prevent or abate damage. See 579 F.Supp. 823, 848-49.

cal poison." The court concluded the "overwhelming remedial goal" of the CERCLA statutory scheme could only be achieved by construing CERCLA's ambiguous statutory terms in favor of liability for the costs incurred by the government in responding to the hazards at toxic waste facilities. *Id.*, 1553, 1557.

To achieve this purpose, the *Fleet Factors* court interpreted "participating in the management" of the facility to mean the secured lender exemption is lost when the lender's involvement in management is "sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose." *Id.*, 1558. This interpretation of the level of participation rendering a lender liable is very close to the *NEPACCO* standard for conduct rendering a person liable as an "owner or operator." See ftn. 2, *supra*.[3]

Importantly, the Eleventh Circuit went further in suggesting it would determine whether a person was liable as an "operator" under a *Shore/NEPACCO* analysis. It cited *United States v. Kayser-Roth Corp.*, 724 F.Supp. 15 (D.R.I. 1989), as providing an example of the activity that could subject a creditor to direct liability as an operator. *Id.*, 1557, ftn. 10. Citing *Shore* and *NEPACCO*, the *Kayser-Roth* court held a parent corporation directly liable as an "operator" of its subsidiary's facility; it cited the district court's opinion in this case as a conflicting view.[4]

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[3] The *Fleet Factors* court viewed the standards for liability as an operator and as a participating lender to be similar but not congruent. *Id.*, 1557. It found the facts alleged supported Fleet's liability as both a participating lender and as an operator.

[4] The *Kayser-Roth* court also pierced the subsidiary's corporate veil to hold the parent liable as an "owner" under a federal common law analysis emphasizing CERCLA's purposes, as opposed to the *Jon-T* "checklist" approach. It cited *Town of Brookline*, *infra*. (Also see Joslyn's petition, pages 10-12.)

This conflict among the courts belies James Company's claim that the Fifth Circuit correctly interpreted the language and history of CERCLA, an Act which the courts have described as "hastily drafted and adopted" and "not a model of statutory clarity." *Fleet Factors*, 901 F.2d 1550, 1554, ftn. 3. Such conflict threatens CERCLA as a national plan. The Court should resolve this conflict.

II.

The Fifth Circuit's *Jon-T* "Alter Ego" Test Conflicts With Federal Common Law.

Despite James Company's protestations, the courts below did not apply a federal common law "alter ego" analysis. Instead, they rigorously applied the *Jon-T* test, a "laundry list" approach which the Fifth Circuit admitted was "essentially the same" as the veil-piercing analysis it had used in diversity cases. While it is true federal common law borrows heavily from state law in this area, it is also true that a court applying the federal common law analysis first determines whether the federal statute at issue places any importance on the corporate form. *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981). Ignoring this step, the courts below focused on *Jon-T's* technical factors and found James Company was not liable as a matter of law because Lincoln was not a sham.

But federal common law does not disregard only "sham" corporations; a corporate entity may be disregarded in the interests of "public convenience, fairness and equity." *Town of Brookline*, 667 F.2d 215, 224. That federal courts will not allow legislative policy to be defeated by the corporate form was a well-established principle of federal law when CERCLA was passed (see, *e.g.*, *Chicago Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Assn.*, 247 U.S. 490 (1918); *Anderson v. Abbott*, 321 U.S. 349

(1944)), and Congress expressly provided that federal law would apply in CERCLA contribution actions. 42 U.S.C. Sec. 9613(f)(1).

Disregarding Lincoln's separate corporate form would serve the interests of public convenience, fairness and equity. It is CERCLA's overriding purpose to shift the cost of toxic waste clean-up to responsible persons and away from innocent taxpayers. Imposing liability on James Company as a responsible party is entirely fair and equitable, given its obvious control over Lincoln: James Company organized Lincoln; it controlled 100% of Lincoln's stock; it provided all of Lincoln's financing; it approved the hiring and firing of Lincoln's executive officers; it monitored Lincoln's collections and disbursements on a daily basis; it received daily reports on Lincoln's plant operations; and it received all of the dividend payments Lincoln ever made.

Moreover, establishing a uniform federal rule as to the circumstances in which a shareholder is liable as an "owner or operator" is appropriate under *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). CERCLA was intended to be a national solution to a national problem. CERCLA liability should not turn on the location of the waste site or the "alter ego" analysis of the state of incorporation selected, fortuitously or intentionally, by the persons which released hazardous waste into the environment. Nor would a uniform federal rule unduly harm commercial relationships predicated on state law. Shareholders are entitled to rely on the law of the state of incorporation solely with regard to the corporation's internal affairs and not when the rights of third parties, especially the rights of the public, are involved. *First National City Bank v. Banco Para El Comercio Exteror De Cuba*, 462 U.S. 611, 621 (1983).

Interestingly, the State of Louisiana apparently did not share James Company's concern that a national standard for CERCLA liability would be inconsistent with our federal system. Louisiana has adopted its own Environmental Quality Act modeled, at least in part, on CERCLA (and other states have also). It argued in its *amicus* brief to the Fifth Circuit that James Company should be held liable for clean-up costs at the Lincoln site.

CONCLUSION

Joslyn respectfully requests this Court to grant its petition for writ of *certiorari*.

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Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I.

THE FIRST CIRCUIT RECOGNIZES DIRECT AND INDIRECT CERCLA LIABILITY FOR PARENT CORPORATIONS

On August 2, 1990, the First Circuit affirmed one of the cases on which Joslyn has relied in arguing that a parent corporation can be liable under CERCLA as an "owner or operator" either directly (by actively participating in its subsidiary's activities) or indirectly (by having the corporate veil of its subsidiary pierced under federal common law). *U.S. v. Kayser-Roth Corp., Inc.*, 724

F.Supp. 15 (D.R.I. 1989), *aff'd* 1990 W.L. 108382, 59 U.S.L.W. 2093 (1st Cir. 1990). (A copy of the First Circuit opinion is attached as Appendix A.)

The First Circuit took greater pain to distinguish "owner" from "operator" liability: It found a parent corporation is directly liable as an operator for active involvement in its subsidiary's activities and indirectly liable as an owner when its subsidiary's separate corporate form is disregarded. Deciding Kayser-Roth was directly liable as an operator, the court did not review the district court's further finding of "owner" liability under authority of federal common law decisions Joslyn cited in this case.

The First Circuit distinguished the Fifth Circuit's opinion in this case as being concerned primarily with owner rather than operator liability. But the Fifth Circuit's focus on owner liability was based on its rejection of the *Kayser-Roth* position that a parent corporation can be directly *or* indirectly liable under CERCLA.

CONCLUSION

This Court should resolve the present confusion by deciding this case.

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APPENDIX A

___ F.2d ___
1990 WL 108382 (1st Cir.(R.I.)),
59 U.S.L.W. 2093

UNITED STATES of America, Plaintiff, Appellee,
v.
KAYSER-ROTH CORP., INC., Defendant, Appellant.
90-1109.
United States Court of Appeals,
First Circuit.
Aug. 2, 1990.

Before Breyer, Chief Judge, Bownes, Senior Circuit Judge, and Selya, Circuit Judge.

BOWNES—

Kayser-Roth Corporation (Kayser) appeals from a decision by the district court of Rhode Island holding it liable as both an "owner" and "operator" for the cleanup costs incurred by the Environmental Protection Agency in response to a spill of trichloroethylene (TCE) at the Stamina Mills textile plant (the site). Stamina Mills, Inc. (Stamina), the nominal owner of the site, was a wholly owned subsidiary of Kayser prior to Stamina's dissolution in 1977.[1] The government has sought to recover cleanup costs from Kayser under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* (CERCLA), based on direct liability (Kayser as operator of the site) and indirect liability (Kayser as owner by "piercing the corporate veil"). Kayser argues that the parent company of a dissolved subsidiary cannot, as a matter of

[1] A detailed description of the corporate structure can be found in the district court opinion. *United States v. KayserRoth Corporation*, 724 F.Supp. 15 (D.R.I.1990).

law, be held liable on either ground. We disagree, and affirm on the basis that Kayser is liable as an operator.

CERCLA was enacted in response to the increasing concern about the vast problems of the disposal of and contamination from hazardous waste throughout the country. It is a remedial statute designed to protect and preserve public health and the environment. Because CERCLA is a remedial statute,

> "we . . . . construe its provisions liberally to avoid frustration of the beneficial legislative purpose. With this in mind, we join the Second Circuit in proclaiming that we will not interpret section 9607(a) in any way that apparently frustrates the statute's goal's."

Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir.1986) (quoting *New York v. Shore Realty*, 759 F.2d 1032, 1045 (2d Cir.1985)) (*Dedham I*).

The Act empowers the government to use money from the "superfund" to clean up hazardous waste sites. 42 U.S.C § 9604(a). Any "person" who is the "owner" or "operator" of a facility at the time of the disposal[2] of a hazardous substance shall be liable for, among other things, all of the costs of removal or other remedial action incurred by the United States. 42 U.S.C. § 9607(a)(2). Liability for the cost incurred is strict[3] and joint and several.[4]

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[2] At oral argument, Kayser argued that the spill was an accident and thus not "disposal" under CERCLA; but spilling is explicitly part of the statutory definition. *See* 42 U.S.C. § 9601(29) (referring to 42 U.S.C. § 6903(3)).

[3] *See, e.g., Dedham Water Company v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1150 (1st Cir.1989) (*Dedham II*); *New York v. Shore Realty*, 759 F.2d 1032, 1042 (2d Cir.1985) (reviewing cases and legislative history on liability).

[4] *See, e.g., O'Neil v. Picillo*, 883 F.2d 176, 178-79 (1st Cir.1989), *cert. denied*, 110 S.Ct. 1115 (1989).

I.

We begin our discussion with the issue of whether a parent corporation may be held directly liable as an operator. "Operator" is defined circularly in the statute as any person[5] operating a facility.[6] 42 U.S.C. § 9601(20)(A)(ii).[7] Congress, by including a liability category in addition to owner ("operators") connected by the conjunction "or," implied that a person who is an operator of a facility is not protected from liability by the legal structure of ownership. Given this grammatical construction and the broad definition of "person," corporate status, while relevant to determine ownership, cannot shield a person from operator liability. In addition, the legislative history provides no indication that Congress intended "all persons" who are "operators" to exclude parent corporations. *Shore*, 759 F.2d at 1044 (reviewing congressional intent and determining that the final version of the statute "imposed liability

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[5] The statute defines "person" extremely broadly and certainly includes a parent corporation. 42 U.S.C. § 9601(21). Kayser does not seriously contest that it is a person within the meaning of the statute.

[6] Owner liability is similarly circular with the additional explicit limitation that when the ownership interest is primarily a security interest without participation in the management of the facility the owner is not liable for cleanup costs. 42 U.S.C. § 9601(20)(A)(iii). That exclusion indicates that if limited owners participate in management, they may be held liable. *Shore*, 759 F.2d at 1052; *see also United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990) (owner through security interest can be held directly liable if actively involved in management).

[7] 42 U.S.C. § 9601(20)(A) provides:

> The term "owner or operator" means . . . (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) . . . . Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

on classes of persons without reference to whether they caused or contributed to the release or threat of release"). Thus, our analysis of the statute and its legislative purpose and history reveals no reason why a parent corporation cannot be held liable as an operator under CERCLA.

Our decision is supported by the interpretation given "operator" by other courts. *See, e.g., United States v. Northeastern Pharmaceutical*, 810 F.2d 726, 743-744 (8th Cir.1986), *cert. denied*, 484 U.S. 848 (1987) (individual liability under § 9607(a)(3)); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986) (parent corporation liable as operator). For example, the majority shareholder of a corporation has been held individually liable as an operator under CERCLA. *Shore*, 759 F.2d at 1052. In addition, a corporation that was an owner through holding a security interest and became active in the management of the corporation has been held liable. *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557 (11th Cir.1990).

We are unpersuaded by the case upon which Kayser relies most heavily to support its position. *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir.1990). Although there is some broad language in *Joslyn* that might support Kayser's position, the opinion is concerned primarily with owner rather than operator liability. The *Joslyn* court framed its issue as whether to "impose direct liability on parent corporations for the violations of their wholly owned subsidiaries." *Joslyn*, 893 F.2d at 81. On the theory of the case presently under consideration, Kayser is being held liable for its activities as an operator, not the activities of a subsidiary. Our reading of the *Joslyn* case is bolstered by a fifth circuit district court's narrow interpretation of the *Joslyn* case. *Riverside Market Devel. Corp. v. International Building Products*, 1990 U.S. Dist.

LEXIS 6375, *Shore Realty* and *Northeastern Pharmaceutical* in holding individual liable as operator and noting that in *Joslyn* there was no participation by parent in activities of subsidiary).

In sum, we believe that a fair reading of CERCLA allows a parent corporation to be held liable as an operator of a subsidiary corporation.

II.

We now examine whether the district court correctly held that Kayser was an operator. This determination is reviewed only for clear error. *See Lynch v. Dukakis*, 719 F.2d 504, 513 (1st Cir.1983). Without deciding the exact standard necessary for a parent to be an operator, we note that it is obviously not the usual case that the parent of a wholly owned subsidiary is an operator of the subsidiary. To be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum it requires active involvement in the activities of the subsidiary.

The district court's excellent opinion found that "Kayser-Roth . . . exerted practical total influence and control over Stamina Mills' operations." *United States v. Kayser-Roth*, 724 F.Supp. 15, 18 (D.R.I. 1989). The court summarized the evidence as follows:

> Kayser-Roth exercised pervasive control over Stamina Mills through, among other things:
>
> 1) its total monetary control including collection of accounts payable;
>
> 2) its restriction on Stamina Mills' financial budget;

> 3) its directive that subsidiary—governmental contact, including environmental matters, be funneled directly through Kayser-Roth;
>
> 4) its requirement that Stamina Mills' leasing, buying or selling of real estate first be approved by Kayser-Roth;
>
> 5) its policy that Kayser-Roth approve any capital transfer or expenditures greater than $5000; and finally, its placement of Kayser-Roth personnel in almost all Stamina Mills' director and officer positions, as a means of totally insuring that Kayser-Roth corporate policy was exactly implemented and precisely carried out.

Id. at 22. Kayser's control included environmental matters including the approval of the installation of the cleaning system that used the TCE.[8] The district court found

> Kayser had the power to control the release or threat of release of TCE, had the power to direct the mechanisms causing the release, and had the ultimate ability to prevent and abate damage. Kayser-Roth knew that Stamina Mills employed a scouring system that used TCE; indeed [it] approved the installation of that system . . . [and] was able to direct Stamina Mills on how the TCE should have been handled.

Id. Such control is more than sufficient to be liable as an operator under CERCLA.

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[8] Although indicia of ability to control decisions about hazardous waste are indicative of the type of control necessary to hold a parent corporation liable as an operator, we do not think the presence of such indicia is essential, assuming there are other indicia of the pervasive control necessary to prove operator status.

Kayser argues vehemently that it was blameless for the spill, which was caused by a third party and was not brought to Kayser's attention until years later.[9] Kayser misunderstands CERCLA. Under this strict liability statute, all that it is necessary to prove is that Kayser was an operator at the time of the spill. Although CERCLA includes a limited affirmative defense that the spill was caused by a third party, that defense does not help Kayser because it only applies if the third party was not in a contractual relationship with the operator, which was not the case here. 42 U.S.C. § 9607(b)(3).[10]

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[9] The government contests Kayser's statement that it didn't know of the spill for years. We do not take a position on this factual issue.

[10] 42 U.S.C. § 9607(b) provides that:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
>
> * * *
>
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

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AFFIRMED

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Nos. 89-1973 and 90-69

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOSLYN MANUFACTURING COMPANY,
Petitioner,

v.

T.L. JAMES & COMPANY, INC.,
Respondent,

and

POWERLINE SUPPLY CO., INC.,
Petitioner,

v.

T.L. JAMES & COMPANY, INC.,
Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

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Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

By Supplemental Brief filed September 10, 1990, petitioner Joslyn Manufacturing Company ("Joslyn") has called this Court's attention to the ruling of the First Circuit in *United States v. Kayser-Roth Corp., Inc.*, to be reported at 910 F.2d 24 (1st Cir. 1990). *Kayser-Roth*, however, provides no support for the instant petitions. The *Kayser-Roth* court itself distinguished the Fifth Circuit's ruling in the instant case with the observation that "in *Joslyn* there was no participation by [the] parent in activities of [the] subsidiary." *Kayser-Roth, reprinted at* Joslyn Suppl. Br. at 5a.

The Fifth Circuit ruling below affirmed the district court's finding that "Lincoln [the subsidiary] operated quite independently from James Company." 893 F.2d at 83. The court thus repeatedly framed the issue in this case as whether to impose liability on parent corporations "for the violations *of their wholly-owned subsidiaries*." 893 F.2d at 81 (emphasis added). *See also id.* at 82 ("Joslyn urges [a construction of CERCLA] to reach parent corporations whose subsidiaries are found liable"); *id.* at 82 (CERCLA does not define "owner or operator" as "including the parent company of offending wholly-owned subsidiaries") The *Kayser-Roth* court, therefore, found *Joslyn* not to be in conflict because "[o]n the theory of the case presently under consideration, Kayser is being held liable for its activities as an operator, not the activities of a subsidiary." *Kayser-Roth, reprinted at* Joslyn Suppl. Br. at 4a. The *Kayser-Roth* rule, then, even if correct, would not subject respondent James Company to so-called "direct" liability as an "operator."

Joslyn's petition in this Court thus presents no conflict between the lower court and any other federal court of appeals. Instead, Joslyn urges the Court to review the Fifth Circuit's failure to apply a rule of law that simply is not relevant to the factual record established in district court.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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Dated: September 21, 1990

(6) (4)

Nos. 89-1973 and 90-69

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOSLYN MANUFACTURING COMPANY, PETITIONER

v.

T.L. JAMES & COMPANY, INC.

POWERLINE SUPPLY COMPANY, INC. ET AL., PETITIONERS

v.

T.L. JAMES & COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a parent corporation is liable under the Comprehensive Environmental Response, Compensation, and Liability Act for response costs resulting from the release of hazardous substances at a subsidiary corporation's facility where the parent maintained a separate corporate identity and had no actual involvement in the operation of the subsidiary's facility.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioners Joslyn Manufacturing Company, Inc. and Powerline Supply Company, Inc. are, respectively, a past owner and a present partial owner of the "Lincoln" site, located in Bossier Parish, Louisiana, that was formerly used to treat wood and to process creosoting chemicals. Respondent T.L. James & Company, Inc. (James Company) is a past owner of a dissolved corporate subsidiary, Lincoln

Creosoting Co., that conducted wood treating and creosoting operations at that site. In 1986 and 1987, the Louisiana Department of Environmental Quality ordered petitioners, respondent, and other parties to clean up hazardous substance contamination at the site. Joslyn filed this action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, and state law against Powerline, the James Company, and others to require those parties to share in the clean-up costs. The United States District Court for the Eastern District of Louisiana entered summary judgment for the James Company, holding that it was not liable under CERCLA for the cost of clean-up. 89-1973 Pet. App. 9a-31a. The court of appeals affirmed. *Id.* at 1a-8a.

1. CERCLA enhances the Environmental Protection Agency's (EPA's) authority to deal effectively with the release of hazardous substances into the environment. See generally *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989). Under Section 104(a)(1) of CERCLA, 42 U.S.C. 9604(a)(1), EPA may take direct "response" actions to abate any actual or threatened release of any hazardous substance. 42 U.S.C. 9604(a)(1). Congress has established the Hazardous Substance Superfund to pay for federal response actions. See 26 U.S.C. 9507. CERCLA provides that the federal government may bring cost recovery actions pursuant to Section 107(a)(4)(A), 42 U.S.C. 9607(a)(4)(A), to replenish the fund when EPA has expended money in performing response actions. Sections 107(a)(4)(B) and 113(f) of CERCLA also authorize non-governmental parties to recover their necessary costs of response in certain circumstances. See 42 U.S.C. 9607(a)(4)(B); 42 U.S.C. 9613(f).

A party seeking recovery of response costs under CERCLA must establish four elements: (1) the defendant falls within one or more of the classes of liable persons described in Section 107(a); (2) the site is a "facility" as

defined in Section 101(9); (3) a "release" or "threatened release" of a "hazardous substance" has occurred or is occurring; and (4) the release or threatened release has caused the party to incur "response costs." 42 U.S.C. 9607(a). See, *e.g.*, *United States* v. *South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 991-992 (D.S.C. 1984), aff'd *sub nom. United States* v. *Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), cert. denied, 491 U.S. 600 (1989).[1]

As to the first of these four elements, CERCLA establishes four broad classes of liable persons: (1) the owners and operators of hazardous substance facilities and sites; (2) persons who owned or operated a facility at the time hazardous substances were disposed of at that facility; (3) persons who arranged for disposal or treatment of the hazardous substances; and (4) persons who transported the hazardous substances and selected the disposal facility. § 107(a)(1)-(4), 42 U.S.C. 9607(a)(1)-(4). CERCLA defines the term "owner or operator" to include "any person owning or operating such facility," § 101(20)(A), 42 U.S.C. 9601(20)(A), and it defines the term "person" to include "an individual, firm, corporation, association, partnership, consortium, [or] joint venture," § 101(21), 42 U.S.C. 9601(21).

2. Petitioner Powerline does not dispute that it currently owns a portion of the Lincoln site and is therefore liable, under Section 107(a)(1), for clean-up expenditures at the site. Similarly, petitioner Joslyn does not dispute that it

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[1] It is well settled that responsible parties are strictly liable under CERCLA. *E.g.*, *Monsanto*, 858 F.2d at 167; *Tanglewood East Homeowners* v. *Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985). In addition, they are jointly and severally liable when the environmental harm is indivisible. *E.g.*, *O'Neil* v. *Picillo*, 883 F.2d 176, 178 (1st Cir. 1989), cert. denied, 110 S. Ct. 1115 (1990); *Monsanto*, 858 F.2d at 172; *United States* v. *Chem-Dyne Corp.*, 572 F. Supp. 802, 810-811 (S.D. Ohio 1983).

owned and operated the wood treating and creosote processing facility at the Lincoln site from 1950 through 1969 and is therefore liable, under Section 107(a)(2), for clean-up expenditures at the site. However, petitioners assert that respondent James Company is also liable under Section 107(a)(2) because its now dissolved subsidiary, Lincoln Creosoting Co., owned and operated the wood treating and creosote processing facility from the facility's inception in 1935 until its sale to Joslyn in 1950.

Joslyn filed its action against the James Company on September 18, 1987. After extensive discovery as to the relationship of the various parties to the Lincoln site, the parties moved for summary judgment. The district court granted summary judgment for the James Company. The court assumed, as a matter of general, pre-CERCLA, corporate law, that the James Company could not be held liable for Lincoln Creosoting Co.'s activities at the site without "first piercing the corporate veil." 89-1973 Pet. App. 10a-15a. Surveying several cases recognizing the limited liability of shareholders (*id.* at 12a-14a), the court stated:

> Based upon the foregoing authorities, this court holds that the corporate form, including limited liability for shareholders, is a doctrine firmly entrenched in American jurisprudence that may not be disregarded absent a specific congressional directive. Neither the clear language of CERCLA nor its legislative history provides authority for imposing individual liability on corporate officers or direct liability on parent corporations.

Id. at 14a.

The district court "decline[d] to adopt the analysis" set forth in other cases, including *New York* v. *Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985), imposing CERCLA liability on corporate officers and shareholders who par-

ticipate in the operation of facilities that release hazardous substances. 89-1973 Pet. App. 11a & n.4, 30a n.20. The court explained that those cases "involved factual situations where the personal participation in the illegal disposal of hazardous waste by the corporate officers was significant." *Id.* at 30a n.20. The court stated that if the James Company and its officers and directors "had been actively involved in the day-to-day operations of Lincoln, including the disposal of hazardous waste, then, arguably liability would attach." *Ibid.*

The district court next examined whether the James Company's relationship with Lincoln Creosoting Co. provided a basis for "piercing the corporate veil" and holding the parent corporation liable for the actions of its subsidiary. The court first observed that it was "undisputed" that federal law would govern that question in this case. 89-1973 Pet. App. 15a. The court concluded, however, that the federal and state tests, which turn on the degree of the parent's involvement in the subsidiary's operations, are used "interchangeably" and are "essentially the same." *Id.* at 16a. The court identified a list of factors relevant to that "heavily fact-specific" inquiry (*id.* at 17a-18a) and then examined the relationship between the parent and its subsidiary in this case (*id.* at 19a-27a). The court found that while the James Company provided capital for Lincoln's initial incorporation, the James Company had virtually no involvement in Lincoln's actual operations:

> The lengthy factual account set forth [in the district court's opinion] establishes beyond doubt that Lincoln strictly adhered to basic corporate formalities by keeping its own books and records and frequently and periodically holding shareholder and director meetings. The daily operations of Lincoln and James Company were kept separate. The driving forces behind Lincoln

> were Messrs. Hayes and Tooke, neither of whom was employed by James Company. Lincoln owned its own property where the physical plant was situated. This property was not utilized for the business of James Company. None of Lincoln's employees were on the payroll of James Company. Though James Company provided capital for Lincoln's initial incorporation, it was the effort and initiative of Messrs. Tooke and Hayes that resulted in the formation of Lincoln.

Id. at 27a. The court concluded that despite "substantial discovery" Joslyn produced no triable issue of fact as to the separate identities of the James Company and Lincoln, and thus there was no legal basis for piercing the corporate veil. *Id.* at 29a-30a.

3. The court of appeals affirmed. 89-1973 Pet. App. 1a-8a. The court stated that the issues presented were whether CERCLA imposes "direct liability on parent corporations for violations of their wholly-owned subsidiaries" and whether "absent such liability, the corporate veil should be pierced to impose liability in the instant case." *Id.* at 2a. As to the first issue, the court of appeals observed that CERCLA does not expressly "hold parents directly liable for their subsidiaries' activities" and that imposing liability on that theory "would dramatically alter traditional concepts of corporation law." *Id.* at 5a. The court concluded that in the absence of "an express Congressional directive to the contrary, common-law principles of corporation law, such as limited liability, govern [the] court's analysis." *Id.* at 6a. As to the second issue, the court of appeals agreed with the district court that the undisputed facts here "militate against piercing the corporate veil" and that the disputed facts, even if resolved in petitioners' favor, would not alter the result. *Id.* at 6a-7a. The court of appeals accordingly

held that the district court properly entered summary judgment. *Id.* at 8a.[2]

DISCUSSION

Petitioners contend that the court of appeals' decision creates a conflict among the federal courts of appeals as to the scope of CERCLA liability. We disagree. In our view, the decision does not create a genuine conflict. Moreover, although its analysis is incomplete, the court's ultimate resolution, based on the record before it, is not necessarily incorrect. The decision is unlikely to affect government and other private cost recovery actions and, indeed, contributes little in defining the contours of CERCLA liability. Accordingly, the petitions for a writ of certiorari should be denied.

1. CERCLA imposes liability on persons—including corporations—"who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." § 107(a)(2), 42 U.S.C. 9607(a)(2). The court of appeals plainly perceived the question in this case as whether CERCLA imposes liability on a parent corporation merely because the parent corporation owns a subsidiary that is itself liable under the statute. The court repeatedly framed the question presented in terms of whether CERCLA imposes "direct liability on parent corporations for violations of their wholly-owned subsidiaries." 89-1973 Pet. App. 2a.[3] And it provided its

[2] The United States participated as amicus curiae in the court of appeals, identifying its theories of parent corporation liability and suggesting that the case be remanded for further factual development relevant to those theories. See C.A. Amicus Br. for the United States; C.A. Amicus Reply Br. for the United States.

[3] See also 89-1973 Pet. App. 5a ("Joslyn urges this court to read CERCLA's definition of 'owner or operator' liberally and broadly to reach parent corporations whose subsidiaries are found liable under the statute."); *ibid.* ("Joslyn asks this court to rewrite the language of

answer in those terms as well: "CERCLA does not define 'owners' or 'operators' as including the parent company of offending wholly-owned subsidiaries." *Id.* at 5a.[4] Instead, the court ruled, a parent corporation may be held liable for its subsidiary's acts only if the separate incorporation "is used as a *sham* to perpetrate a fraud or avoid personal liability." *Id.* at 8a. In those circumstances, a court could "pierc[e] the corporate veil" and hold the parent corporation "indirectly liable for [the subsidiary's] activities." *Ibid.*

The court of appeals thus rejected the theory that CERCLA imposes liability on a parent corporation by virtue of the parent's mere ownership of a liable subsidiary. Whatever the merits of that broad theory, no court of appeals has accepted it. Rather, the courts have indicated, as in this case, that a parent corporation may be held liable based on its ownership of a liable subsidiary only by "piercing the corporate veil."[5]

Petitioners are thus mistaken in suggesting that the court of appeals' ruling conflicts with decisions of other courts of appeals. As we explain below, petitioners rely on cases that address a question distinct from that presented here: whether parent corporations and stockholders who *them-*

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the Act significantly and hold parents directly liable for their subsidiaries' activities.").

[4] See also 89-1973 Pet. App. 7a ("Congress is quite capable of creating statutes that hold shareholders or controlling entities liable for the acts of valid corporations."); *ibid.* ("Similarly, La. Rev. Stat. Ann. Section 30:2276 (West 1989 Supp.) does not impose direct liability on parent corporations for the acts of their subsidiaries.").

[5] See, *e.g.*, *United States* v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 744 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985); see also *United States* v. *Kayser-Roth Corp.*, 724 F. Supp. 15, 23 (D.R.I. 1989), aff'd on other grounds, 910 F.2d 24 (1st Cir. 1990), petition for cert. pending, No. 90-816 (filed Nov. 23, 1990).

selves participate in the operation of the subsidiary's facility are directly liable under Section 107(a) of CERCLA as operators of the facility. Indeed, we expect that the question whether a parent corporation may become liable under CERCLA by virtue of mere ownership of a liable subsidiary is unlikely to generate a conflict among the courts of appeals. It is not the policy of the United States, which is the usual plaintiff in CERCLA cost recovery actions, to seek cost recovery from a parent corporation based solely on the parent's ownership of a liable subsidiary. There is, accordingly, no warrant for further review of the court of appeals' decision.

2. Although the United States does not seek cost recovery from parent corporations based on their mere ownership of liable subsidiaries, the government may seek cost recovery from a parent corporation based on a number of other established theories of corporate liability. For example, it "is a well-established rule that a corporation will be held liable for the torts and wrongful acts of its directors, officers, and employees within the scope of their authority." W. Knepper & D. Bailey, *Liability of Corporate Officers and Directors* § 2.11 (4th ed. 1988).[6] Accordingly,

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[6] See, *e.g.*, *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 395 (1922) ("A corporation is responsible for the wrongs committed by its agents in the course of its business, and this principle is enforced against the contention that torts are *ultra vires* of the corporation."); see also, *e.g.*, 10 *Fletcher Cyclopedia on the Law of Private Corporations* § 4877, at 323 (rev. 1986) ("corporations can commit almost any kind of a tort that individuals can commit, and are liable for the acts of their agents and servants in the same degree as natural persons are liable for the acts of their servants and agents * * *; that is now hornbook law, unless changed by statute"); R. Stevens, *Handbook on the Law of Private Corporations* 359 (2d ed. 1949) ("In applying the doctrine of respondeat superior to any master, corporate or noncorporate, the fundamental question is whether the servant acted within the actual or apparent scope of his employment.").

in an amicus curiae brief filed in this case, the United States suggested that the court of appeals consider whether the James Company is liable based on any activities of *its officers or employees* in operating the Lincoln facility. See C.A. Amicus Br. for the United States 14-25.

The court of appeals did not discuss or directly acknowledge the government's theory. Rather, it limited its discussion to the theory advanced by Joslyn: namely, that a parent corporation is liable under CERCLA based on its power to control its subsidiary—a power that will always exist where the parent owns a majority of the subsidiary's stock.[7] As we have explained (pp. 7-8, *supra*), the court of appeals rejected that theory. Although it would have been proper for the court of appeals to consider the government's alternative theory, we cannot say that the court of appeals erred in failing to do so, or that the matter raises any issue warranting this Court's review. A court is not obligated, of course, to consider issues raised by amici.[8] And the government expressly acknowledged in its amicus brief that Joslyn had not squarely presented the government's theory to the court of appeals.[9] Furthermore, the government

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[7] Joslyn argued that CERCLA "imposes liability on parent corporations if they knew or should have known about the pollution and had the authority to control or abate it, but did not." Joslyn C.A. Br. 19. See also Powerline C.A. Br. 34-36. Joslyn makes a similar argument in this Court. See 89-1973 Pet. 9. Powerline's position on the merits in this Court is unclear. See 90-69 Pet. 6-11.

[8] See, *e.g.*, *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell* v. *Wolfish*, 441 U.S. 520, 530 n.13 (1979); *Knetch* v. *United States*, 364 U.S. 361, 370 (1960).

[9] The government stated below that "[t]he specific positions asserted by the United States in [its] brief are not presented by and, in at least one respect, are in direct conflict with the positions pressed by the appellants in their briefs." C.A Amicus Br. for the United States, Statement Regarding Oral Argument. While statements in Joslyn's court of appeals brief might be interpreted to coincide with the government's

conceded that the factual record before the court of appeals might not support imposition of liability under that theory in this case.[10]

At all events, we do not interpret the court of appeals' decision as rejecting the government's theory, which has been adopted by three other courts of appeals and rejected by none. See *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990), petition for cert. pending, No. 90-816 (filed Nov. 23, 1990); *United States* v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 744 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985). The court of appeals "declined" Joslyn's suggestion that the court "follow the several courts, including the Second Circuit, which have extended CERCLA liability to parents." 89-1973 Pet. App. 5a. The court's decision, however, cannot reasonably be read as rejecting the standard of liability set forth by the Second Circuit in *Shore Realty Corp.*; rather, the court of appeals apparently agreed with the district court that the Second Circuit's *Shore Realty Corp.* standard was simply not apposite on the record in this case.

In *Shore Realty Corp.*, the Second Circuit held the corporate officer and shareholder who "made, directed, and controlled" all corporate decisions and actions, who was "in charge of the operation of the facility in question," and who "specifically directs, sanctions, and actively participates

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theory, the court of appeals did not interpret Joslyn's argument in that manner, and its failure to do so does not present any question warranting review.

[10] The government explained that its interest was limited to an articulation of "the proper *legal* standard" and that "the facts related to James Company's participation in the management of Lincoln should be fully developed and assessed by the district court after the proper legal standard is articulated by this Court." C.A. Amicus Reply Br. for the United States 7-8.

in Shore's maintenance of the nuisance" to be directly liable as an "operator" under CERCLA. 759 F.2d at 1038, 1052. In this case, the district court concluded that while the James Company participated in the initial capitalization of the Lincoln Creosoting Co., there was no showing that the James Company or its officers participated in the operation of the Lincoln facility. See 89-1973 Pet. App. 27a. The district court accordingly declined to adopt the Second Circuit's analysis. *Id.* at 30a n.20. The district court explained, however, that the *Shore Realty Corp.* analysis would likely control if the James Company had actively participated in the operation of the Lincoln facility:

> If T.L. James & Company and its officers and directors had been actively involved in the day-to-day operations of Lincoln, including the disposal of hazardous waste, then, arguably, liability would attach.

Ibid. We believe that the court of appeals likewise declined to follow *Shore Realty Corp.* because the Second Circuit's liability standard was simply not applicable to the facts before the court in this case.[11]

In sum, the court of appeals' decision in this case holds that the James Company may not be held directly liable under CERCLA by virtue of its mere ownership of a liable subsidiary. The decision does not address the distinct (and in this case purely hypothetical) question whether a parent corporation may be held directly liable based on its own activities at the facility. As the First Circuit recently explained, the court of appeals' decision in this case does not

[11] A district court in the Fifth Circuit has since similarly observed that "[i]f, as in the cases cited by Judge Stagg, [a shareholder] personally participated in the disposal of hazardous wastes, then he may be liable for the wrongful acts of the corporation even under Judge Stagg's *Joslyn* opinion." See *Riverside Market Devel. Corp.* v. *International Bldg. Products*, No. 88-5317 mem. op. (E.D. La. May 23, 1990) (1990 WL 72249, *3-*4).

conflict with the uniform view of the First, Second, and Eighth Circuits that corporate parents or their officers may become directly liable as operators under CERCLA if they actively participate in operating a subsidiary's facility. *Kayser-Roth Corp.*, 910 F.2d at 26-27. There is, accordingly, no occasion for this Court to address that issue (or other non-applicable theories of direct corporate liability) in this case. Cf. *Conway* v. *California Adult Auth.*, 396 U.S. 107, 110 (1969) (review of a "hypothetical issue" would constitute "an advisory opinion" and "an unjustifiable intrusion on the time of the Court").

3. The court of appeals recognized that a parent corporation may be held liable for its subsidiary's activities if there are grounds for disregarding the parent's and the subsidiary's separate corporate identities. See pp. 6-7, *supra*. The court agreed with the district court, however, that "the facts here militate against piercing the corporate veil." 89-1973 Pet. App. 7a. Powerline does not challenge this aspect of the court of appeals' decision. Joslyn contends, however, that the court of appeals erred by employing an unduly restrictive standard to make that determination. *Id.* at ii, 9, 12.

There is no real disagreement as to the broad principles that determine whether corporate forms should be disregarded. This Court has recognized on numerous occasions that an incorporated entity "is not to be regarded as legally separate from its owners in all circumstances." *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983). "In particular, the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies." *Id.* at 630. See, *e.g.*, *Anderson* v. *Abbott*, 321 U.S. 349, 362-363 (1944). Where, as here, the legislative policies are expressed in a federal statute, the question whether separate corporations

should be treated as one is determined as a matter of federal law. *Id.* at 365.

As we have explained (pp. 7-8), the court of appeals rejected the notion that a parent corporation "owns" or "operates" a facility, for purposes of CERCLA, by virtue of its mere ownership of a subsidiary that holds title to the facility. The question, then, is what additional factors would justify treating a parent – that is not directly liable based on its actual participation in the operation of the facility – indirectly liable for its subsidiary's actions. Under traditional corporate law principles (which inform interpretation of the federal statute), the separate corporate identities of a parent and its subsidiary may be disregarded in a number of circumstances, including where "stock ownership has been resorted to, not for the purpose of participating in the affairs of the corporation in the normal and usual manner, but for the purpose * * * of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies." *Chicago M. & St. P. Ry.* v. *Minneapolis Civic & Comm. Ass'n*, 247 U.S. 490, 501 (1918). See, *e.g.*, *United States* v. *Jon-T Chemicals, Inc.*, 768 F.2d 686, 691 (5th Cir. 1985), cert. denied, 475 U.S. 1014 (1986); 1 *Fletcher Cyclopedia on the Law of Private Corporations* § 43, at 729-731 (rev. 1990). Applying that standard, the court of appeals affirmed the district court's determination that, in this case, the corporate veil should not be pierced.

We agree that CERCLA liability may be imposed on a parent corporation if a subsidiary that functions as the parent's "alter ego," "agent," or "instrumentality" is found liable. See *Jon-T Chemicals, Inc.*, 768 F.2d at 691. Those metaphorical terms, however, derive their meaning largely through "a careful review of the entire corporate relationship between various corporate entities, their directors and officers" (1 *Fletcher Cyclopedia on the Law of Private*

Corporations, *supra*, at 731). Corporate forms might be disregarded under CERCLA in other circumstances as well, depending on the manner in which those forms are employed in the CERCLA context. Cf. *Capital Telephone Co.* v. *FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974). This case, however, does not present an appropriate occasion to address that topic.

First, there currently is no conflict among the courts of appeals on the extent to which corporate forms may be disregarded under CERCLA. Indeed, the Fifth Circuit is the first court of appeals to rule on the issue.[12] Second, in many cases where it would be appropriate to disregard separate corporate identities, the parent corporation may be held directly liable, without piercing the corporate veil, based on its *own* actual participation in the operation of the facility in question. See *Kayser-Roth Corp.*, 910 F.2d at 26-28 & n.11; *United States* v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d at 744; *Shore Realty Corp.*, 759 F.2d at 1052. See 1 *Fletcher Cyclopedia on the Law of Private Corporations*, *supra*, § 41.27. Thus, the issue may have limited practical importance. Finally, "the question of corporate identity is normally one of fact; each case is determined according to its own circumstances." *Id.* at § 43, at 730. In this case, the district court found that Joslyn fell far short of establishing the factors normally associated with "piercing the corporate veil," 89-1973 Pet. App. 25a-27a, and the court of appeals affirmed, without extended discussion, the district court's "heavily fact specific" determination (*id.* at 18a). In view of (1) the absence of a

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[12] The case that Joslyn cites as presenting a conflict, *Town of Brookline* v. *Gorsuch*, 667 F.2d 215 (1st Cir. 1981), involved the question whether a university-owned corporation qualified as a non-profit health or educational institution for the purpose of a regulatory exemption under the Clean Air Act, 42 U.S.C. 7601 *et seq.*

conflict among the courts of appeals, (2) the possibility that the issue may have limited importance in many cases, and (3) the fact-specific nature of the inquiry, this Court's review is not warranted at this time.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 89-1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOSLYN MANUFACTURING COMPANY,
Petitioner,

v.

T. L. JAMES & COMPANY, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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I.

THE GOVERNMENT ABANDONED THE POSITION IT TOOK IN THE FIFTH CIRCUIT IN ORDER TO PROTECT A JUDGMENT IT LATER OBTAINED IN THE FIRST CIRCUIT

In considering the brief for the United States, it must be remembered that it is the prevailing party in *U.S. v. Kayser-Roth Corp.*, 724 F.Supp. 15 (D.R.I. 1989), aff'd., 910 F.2d 24 (1st Cir. 1990), petition for cert. pending, No. 90-816. In that case, the district court adopted the government's theories of direct and indirect CERCLA liability. It found Kayser-Roth Corporation directly liable for clean-up costs at its subsidiary's facility by virtue of its active

participation in its subsidiary's activities. It also found Kayser-Roth indirectly liable under a federal common law test. The First Circuit affirmed the direct liability finding and found it unnecessary to review the district court's indirect liability analysis.

The government now opposes Joslyn's petition for *certiorari* seeking review of the Fifth Circuit's refusal to apply the theories of direct and indirect CERCLA liability adopted in *Kayser-Roth*. It does so more as a party protecting its victory than as a national representative promoting a proper development of federal law.

Before the First Circuit decided *Kayser-Roth*, the government filed an *amicus* brief supporting Joslyn in the Fifth Circuit. It argued Joslyn's contribution claim against James Company should be remanded because the district court had not applied the proper standards for direct and indirect CERCLA liability.

The government proposed the following direct liability standard in the Fifth Circuit:

> The United States urges this Court to establish a standard of direct liability under CERCLA based on the decisions in *Shore Realty* and *NEPACCO*. That standard would provide that a person is directly liable under §107 of CERCLA, 42 U.S.C. 9607, where that person exercised authority for a company's hazardous substance operations by participating in (a) operating a hazardous substance facility or vessel; or (b) arranging for the disposal or treatment of hazardous substances; or (c) accepting hazardous substances for transportation. Under this standard, a parent corporation is directly liable when its officers, directors, or employees, in the ordinary course of their activities in these roles, participates in the hazardous substance disposal activities just enumerated.

C.A. Amicus Br. for U.S., 22-23.

After the First Circuit decided *Kayser-Roth* in its favor (and after Kayser-Roth Corporation filed its petition for *certiorari*), the government labors to persuade this Court that the Fifth Circuit decision does not conflict with *Kayser-Roth*, *Shore Realty* and *NEPACCO*. While it admits the Fifth Circuit failed to "discuss", "directly acknowledge," or "consider" its direct liability theory, U.S. Br., 10, the government somehow claims the court did not reject it. U.S. Br., 11. But the Fifth Circuit did not equivocate or limit its ruling to the facts: It expressly declined to follow *Shore Realty*. See Joslyn's Pet. App. 5a.

The government now claims the Fifth Circuit rejected *Joslyn's* theory, not the one it advocated (although its footnote 9 concedes "statements in Joslyn's court of appeals brief might be interpreted to coincide with the government's theory. . ."). Defeat is often an orphan, but "who proposed what theory" is less important than the court's decision. It is enough that the Fifth Circuit applied no direct liability theory.

Joslyn agrees with the position the government took in the Fifth Circuit, i.e., that Joslyn was entitled to have its case decided under the direct liability standard adopted in *Shore Realty*, *NEPACCO* and *Kayser-Roth*. Joslyn submits a trier of fact could reasonably find James Company liable under that standard. Lincoln's wood treatment plant was undeniably a "hazardous substance operation." James Company exercised authority over Lincoln's operations. While its officers, directors and employees may not have been handling the chemicals, they were involved extensively in Lincoln's operations. See Joslyn's petition, 2-4.

The government's brief to this Court also dances away from the position it took on indirect CERCLA liability in the Fifth Circuit. The government urged that court to apply

a federal common law standard for indirect CERCLA liability in which a subsidiary's corporate veil would be pierced under the following circumstances:

> A. The financial resources of the subsidiary are not adequate to pay the CERCLA response cost for which it is liable under §107 or the subsidiary is otherwise not available to pay those costs (or the subsidiary does not have the financial resources to perform in response to EPA's clean-up orders issued under or an injunction secured pursuant to §106(a) of CERCLA); *and*
>
> B. The subsidiary performed a function of economic importance to the enterprise of a parent, *or* the parent participates directly in the management of the subsidiary.

C.A. Amicus Br. for the U.S., 47.

The government acknowledges the Fifth Circuit did not apply this test, but still opposes review in this Court. First, it argues there is no conflict among the circuits as to the extent to which corporate forms may be disregarded under CERCLA. But the First Circuit in *Town of Brookline v. Gorsuch*, 667 F.2d 215 (1st Cir. 1981), disregarded separate corporate forms to enforce the federal environmental policy embodied in the Clean Air Act, without plodding through the "heavily fact specific" state law analysis the lower courts employed here. We cannot perceive why the Clean Air Act and CERCLA should have different standards. The government's brief provides no explanation.

Second, the government suggests federal and state veil-piercing rules are based on the same broad principles, but this ignores one critical difference. The federal analysis applied in *Town of Brookline* looks closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form. The Fifth Cir-

cuit's *Jon-T* analysis gave no weight to CERCLA's purpose of shifting clean-up costs to persons who benefitted from hazardous waste disposal.

Third, the government opposes *certiorari* on the ground the indirect liability theory may have "limited practical importance" because the parent which had its subsidiary's corporate identity disregarded would probably also be directly liable for its own participation in the operation of the subsidiary's facility.

The government's dismissal of indirect liability as unimportant rings hollow. This Court's determination of the circumstances in which separate corporations are treated as one in CERCLA cases will also determine who will pay millions (if not billions) of dollars in clean-up costs at sites throughout the United States. The government's discussion of the proper veil-piercing standard under federal common law covered 24 pages of its *amicus* brief to the Fifth Circuit.

Moreover, the indirect liability test the government proposed in its Fifth Circuit brief would not hold a parent liable solely for its participation in the subsidiary's management. It also imposes liability on the parent if the subsidiary is unable to respond to its CERCLA liability and had performed a function of economic performance to the parent. A trier of fact could reasonably find James Company liable under this test. Lincoln is unavailable to respond to its CERCLA liability, and James Company profited from Lincoln's disposal of hazardous waste.

A parent corporation may also be indirectly liable because of its participation in the management of its impecunious or dissolved subsidiary under the government test. But the possibility this prong of the indirect theory overlaps with direct liability does not support the argument that this Court should not review this case. The

Court may find that disregarding the subsidiary's corporate form under a federal common law analysis makes the most sense in CERCLA cases. It may choose to accept, reject or refine the proposed theories of indirect liability, direct liability, or both.

CONCLUSION

CERCLA should have the same meaning throughout the nation. The conflict between the Fifth Circuit's interpretation of CERCLA liability and that adopted in the First, Second and Eighth Circuits cannot be papered over. This Court should grant Joslyn's petition.

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